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THE COMMISSION ON THE INTERNATIONAL APPLICATION OF THE U.S. ANTITRUST LAWS ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 432

A BILL TO ESTABLISH A COMMISSION ON THE INTERNATIONAL APPLICATION OF ANTITRUST LAWS

DECEMBER 3, 1981

Serial No. J-97-22

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

90-805 O WASHINGTON: 1982

5521-47

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THE COMMISSION ON THE INTERNATIONAL APPLICATION OF THE U.S. ANTITRUST LAWS ACT

THURSDAY, DECEMBER 3, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias and Specter.

Staff present: Quentin Crommelin, Jr., staff director; Peter Chumbris, antitrust counsel; Steve Cannon, antitrust counsel; Ralph Oman, staff director, Subcommittee on Criminal Law; Charlie Borden, professional staff member; Bruce Cohen, counsel; Marcy Tiffany, antitrust counsel and chief economist; and Mary Louise Westmoreland, counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today we will hear testimony on S. 432, the Commission on the International Application of the U.S. Antitrust Laws Act. This bill would establish a commission to conduct a 1-year study on the effects of the application of the U.S. antitrust laws in foreign commerce.

Specifically, the Commission would address the effects of the antitrust laws on U.S. competition abroad and on relations with other countries. The Commission would also address the issue of reciprocity between nations, application of U.S. rules of court in antitrust enforcement on international transactions, and the application of U.S. antitrust laws to joint ventures, mergers, acquisitions, and other arrangements between the United States and foreign-based enterprises.

There is growing concern that the application of our antitrust laws has prevented U.S. firms from competing effectively in international markets. The aim of the Commission would be to investigate this perceived problem and to suggest an appropriate response. This bill would place under one authority the examination and discussion of international antitrust issues. It would also provide a signal to the business community here and abroad that we are deeply sensitive to these issues.

We are indeed fortunate today to have a distinguished group of witnesses, all of whom are experts in the field of international anti-

trust law. I am particularly pleased to welcome our friend and colleague, the Honorable Jacob Javits, who served in this body with such great distinction. I believe that he is on his way up now if he is not in the hall.

Senator Mathias, do you have an opening statement that you wish to make?

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. Thank you, Mr. Chairman.

I want to welcome all of those who have come here to testify today as witnesses before the Judiciary Committee in the hearing on S. 432, which as you have said is a bill to establish a blue-ribbon task force to study the international application of the antitrust laws.

My vision of this is that in the course of these hearings we will not only study the effect of the antitrust laws on American business which is attempting to operate in other countries but look at the aspect of the effect of the antitrust laws on foreign business which is operating within the United States. It is two sides of the same coin. Of course, it all looks at the competitive factors, indeed at the existence of competition in both arenas.

We held 2 days of hearings in the 96th Congress on the predecessor of this bill. I think it is an interesting fact that that bill passed the Senate unanimously, without a single dissenting vote. At the time that it was called up on the Senate floor it had 20 cosponsors, a fifth of the Senate sponsoring it.

Now if there were valid arguments for that bill last year, it seems to me that there are even better arguments for S. 432 this year. I think the case has grown even more persuasive.

We hear our trading partners around the world—some of our most important trading partners, Great Britain, Germany, for example—complaining both publicly and directly to the President about what they consider to be arrogance in the actions of the United States in the enforcement of our laws extraterritorially, an attempt to extend the reach of U.S. laws to their territory. Those complaints have been the basis and perhaps the justification for their actions in adopting statutes of their own which are erected as obstacles to prevent their citizens from aiding or abetting the U.S. effort in any way.

Of course, in addition to these complaints from other places all of us on Capitol Hill are daily bombarded with complaints from U.S. businesses, from our own business executives who remain uncertain as to exactly what they can do and what they cannot do in other countries. No one can estimate the effect of this because it is subjective: To what extent does corporate management, sitting in a board room, have the capacity to decide what they will do, when they will do it, when they are not sure of the law? We have been hearing complaints from our trading partners and business people for too long, and this proposal for a task force will give us a chance to get them out on the table.

Now it is a well-known maxim that if you speak of the angels, you will hear the flutter of their wings. I was just about to say that I cannot think of a better person to get things going than our great friend and respected colleague, Jack Javits. I am particularly

pleased to join with the chairman in welcoming Senator Javits to this committee.

As everyone in the room knows, he has long championed the idea of a thorough study of the antitrust laws, especially in their application in the international arena. This bill today bears Jack Javits' imprimatur, and we are looking forward to his testimony. Therefore, I will suspend, Mr. Chairman.

I request that a copy of my bill S. 432 be placed in the record.

[The bill follows:]

II

97TH CONGRESS
1ST SESSION

S. 432

To establish a Commission on the International Application of Antitrust Laws.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 5 (legislative day, JANUARY 5), 1981

Mr. MATHIAS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To establish a Commission on the International Application of Antitrust Laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Commission on the International Application of the United States Antitrust Laws Act".

ESTABLISHMENT OF COMMISSION

SEC. 2. (a) There is established the Commission on the International Application of the United States Antitrust Laws (hereinafter referred to as the "Commission").

(b) The Commission shall be composed of eighteen members who shall be appointed by the President as follows:

(1) four members from the executive branch of the Government:

(A) the Vice President of the United States;

(B) the Assistant Attorney General for the Antitrust Division;

(C) the Chairman of the Federal Trade Commission; and

(D) the Legal Advisor of the Department of State;

(2) four members from the Senate, two members to be named upon the recommendation of the majority leaders, and two members to be named upon the recommendation of the minority leader;

(3) four members from the House of Representatives to be named upon the recommendation of the Speaker of the House of Representatives; and

(4) six members from the private sector.

(c) The Chairman of the Commission shall be the Vice President of the United States.

(d) The President shall designate the Assistant Attorney General for the Antitrust Division and the Legal Advisor of the Department of State as the Vice Chairmen of the Commission.

(e) The majority and minority leaders and the Speaker of the House shall make recommendations for the appointments to be made pursuant to subsection (b) within thirty days of the enactment of this Act.

(f) The President shall make all of the appointments in accordance with subsection (b) after receiving the recommendations set forth in paragraphs (2) and (3) of subsection (b) but such appointments shall be made no later than sixty days after the date of enactment.

(g) The first meeting of the Commission shall be called by the President within thirty days following the date such appointments to the Commission are made.

(h) Not more than one-half of the members of each class of members set forth in paragraphs (2), (3), and (4) of subsection (b) shall be from the same political party.

(i) The term of office for members shall be for the term of the Commission.

(j) A vacancy in the Commission shall not affect its powers, and shall be filled in the same manner in which the original appointment was made.

(k) Ten members of the Commission shall constitute a quorum (but a lesser number may hold hearings).

(l) The membership of the Commission shall be selected in such a manner as to be broadly representative of the various interests, needs, and concerns which may be affected by the international aspects of the United States antitrust laws.

PURPOSES OF THE COMMISSION

SEC. 3. (a) The Commission shall—

(1) conduct a comprehensive study of and make recommendations concerning the international aspects of the antitrust laws of the United States, the applicable rules of court, related statutes, administrative procedures, and their applications, their consequences, and their interpretation by the courts and Federal agencies (hereinafter referred to as "the United States antitrust laws"); and

(2) make periodic reports to the President and to the Congress concerning its activities and make a final report to the President and the Congress concerning such comprehensive study.

(b) Such comprehensive study shall specifically address—

(1) the application of the United States antitrust laws in foreign commerce, and their effect on—

(A) the ability of United States enterprises to compete effectively abroad; and

(B) the ability of United States enterprises to compete or deal effectively with foreign controlled enterprises in market and nonmarket economies;

(2) the effect of the application of the United States antitrust laws on United States relations with other countries;

(3) the jurisdiction and scope of the application of the antitrust laws to foreign conduct and foreign parties;

(4) the issue of reciprocity between nations with respect to mutual access to markets, equal opportunities for foreign investments, and enforcement of antitrust laws;

(5) the applications of United States rules of court relating to the enforcement of antitrust laws in the context of international transactions (for example, the "per se" and "rule of reason" doctrines); and

(6) the application of the United States antitrust laws to joint ventures, mergers, acquisitions, and distributions and licensing arrangements between and among the United States and foreign based enterprises.

COMPENSATION OF MEMBERS OF THE COMMISSION

SEC. 4. (a) Members of Congress, who are members of the Commission, shall serve without compensation in addition to that received for their services as Members of Congress, but they shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(b) Notwithstanding section 5533 of title 5, United States Code, any member of the Commission who is in the executive branch of the Government shall receive the compensation which he would receive if he were not a member of the Commission, plus such additional compensation, if any, as is necessary to make his aggregate salary not in excess of the highest rate for employees compensated at the rate of GS–18 of the General Schedule under section 5332 of title 5, United States Code, and he shall be reimbursed for travel, subsistence, and other necessary expenses incurred by him in the performance of the duties vested in the Commission.

(c) Members from the private sector shall each receive compensation not exceeding $200 per diem when engaged in the performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of such duties.

POWERS OF THE COMMISSION

SEC. 5. (a)(1) The Commission or, on the authorization of the Commission, any subcommittee thereof, may, for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and places, administer such oaths, and require, by subpena or otherwise, the attendance and testimony of such witnesses, and the production of such books, records, correspondence, memorandums, papers, and documents as the Commission or such subcommittee may deem advisable. Subpenas may be issued to any person within the jurisdiction of the United States courts, under the signature of the Chairman or Vice Chairmen, or any duly designated member, and may be served by any person designated by the Chairman, the Vice Chairmen, or such member. In the case of the failure of any witness to comply with any subpena or to testify when summoned under authority of this section, the provisions of sections 102 through 104, inclusive, of the Revised Statutes (2 U.S.C. 192–194), shall apply to the Commission to the same extent as such provisions apply to Congress.

(2) For purposes of section 552(e) of title 5, United States Code, the Commission shall not be considered to be an agency.

(b) Each department, agency, and instrumentality of the executive branch of the Government, including independent

agencies, is authorized and directed to furnish to the Commission, upon request made by the Chairman or Vice Chairmen, such information as the Commission deems necessary to carry out its function under this Act.

(c) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 of the General Schedule under section 5332 of such title, and

(2) procure temporary and intermittent services in accordance with the provisions of section 3109 of title 5, United States Code, but at rates not to exceed $200 per day for individuals.

(d) The Commission is authorized to enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties to such extent and in such amount as are provided in appropriations Acts.

FINAL REPORT

SEC. 6. The Commission shall transmit to the President and to the Congress not later than one year after the first meeting of the Commission, a final report containing a detailed statement of the findings and conclusions of the Commission, including its recommendations for administrative, judicial, and legislative action which it deems advisable. Any formal recommendation made by the Commission to the President and to the Congress must have the majority vote of the Commission as present and voting.

EXPIRATION OF THE COMMISSION

SEC. 7. Sixty days after the submission to Congress of the final report provided for in section 6, the Commission shall cease to exist.

AUTHORIZATION OF APPROPRIATION

SEC. 8. There are hereby authorized to be appropriated such sums as may be necessary to carry out the activities of the Commission.

EFFECTIVE DATE

SEC. 9. The provisions of this Act shall take effect upon the date of enactment of this Act.

The CHAIRMAN. Thank you.

Senator Specter, do you have an opening statement?

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman.

Very briefly, I am pleased to participate in the hearings on this very important piece of legislation and very pleased to hear from Senator Javits. I shall not preempt any of the important time at hand.

Thank you very much.

The CHAIRMAN. This is a very important piece of legislation and we are fortunate to have so many outstanding witnesses here today. Our first witness today is going to be the distinguished former Senator from New York, who served so ably and compiled such a distinguished record in this body.

I have another appointment to appear before another committee in just a few minutes, so today I will turn the chair over to Senator Mathias, who is the author of this legislation.

Senator Javits, I just want to say what a pleasure it is to have you with us again. We appreciate your presence. Thank you for coming and testifying.

Mr. JAVITS. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Mathias, will you take the chair now?

STATEMENT OF HON. JACOB K. JAVITS, FORMER SENATOR, LAW FIRM OF TRUBIN, SILCOCKS, EDELMAN & KNAPP, NEW YORK, N.Y.

Mr. JAVITS. Mr. Chairman, I wish to express my unfailing pleasure at being able to appear before my colleagues and to contribute anything I can to their enlightenment and to the enlightenment of our country on issues as broad and important as this one. It is a matter which I pursued when here, in company with the present chairman, and it is a matter which I hope will be pursued whether I am here or not until a decision has been made, for we have now found that——

Senator MATHIAS. Let me interrupt you to say that that will be the case as far as I am personally concerned. I think we need to have some resolution of this matter.

Mr. JAVITS. I thank my colleague.

We have now found, Mr. Chairman, that business is the only way in which you can vault the barriers which national lines of authority and sovereignty may retain because they may be essential for other reasons of politics and freedom of association between nations for security, for cultural purposes, for education and many other things, geography, common interests of one kind or another. However, from the point of view that generally speaking they have stood in the way of improving the economic conditions of the individual rather than enhancing them, therefore you have the multinational or transnational corporation, a phenomenon of this age of the capitalist system and probably a phenomenon having the most capacity for improving the system of anything we have yet come across.

How that system can operate—consistent with our belief in competition and the fact that that is not a universal belief—that is,

either in other countries by their indigenous rules of law or by allowing their nationals to operate in other countries on that same basis, nations of the world who are subject to whatever antitrust law there is have been able to operate and are operating in a way which is denied to us.

Now that is the essence of it. The essence of it is that in a society which believes in competition we are tying one hand behind our back, and we are not competing effectively and adequately. Hence the enormous burden which we carry of armament and security responsibility, and the enormous burden for many other things dealing with the world, including refugees, becomes greater and we are always looked to as the ones to take the heaviest share.

All of this has to come out of somewhere and in our case it comes out of an effective economic system, able to reach out and earn money from other countries. When this balance is disturbed, seriously disturbed, you get a very heavy imbalance in international trade and you find our economy first panting for air, and when it cannot find enough, suffering as a result.

We cannot go on running up a $30 billion annual deficit of trade. The fact that interest rates currently are such as to compensate us for a good deal of that balance by bringing deposits into this country is only a fool's paradise because we are paying so much for it as to cause a very serious strain to the American economy.

The question then is, what shall we do, what may we do in such a way as will not destroy competition at home in order to make us more competitive abroad, that may retain competitiveness at home and supply it even where it does not now exist abroad. The issues which the commission is to undertake seem to us to be apposite to this inquiry.

I wish to point out at the outset that we are dealing here with a statute which does what Congress does best, which is to inquire. As a factfinder and as a teacher, and for an elucidation of the facts and the ability to get them and to make them reliable, I think Congress is unparalleled. For one, the whole country judges it, so it is pretty hard to get away with slipshod work. For another, the whole community of academia and the whole think-tank community watches it like a hawk. For those reasons, too, it is very hard to get away with faulty premises.

In respect of the antitrust laws, what has become very clear is that there are glaring examples in a number of cases of a disadvantage to us in the way in which we apply the antitrust laws internationally. However, one thing that it seems to me has been overlooked a lot as to the effect of the antitrust laws on the American ability to compete is the concept of the antitrust laws as far as our exporters are concerned.

They believe that the thrust of the Government is to use the antitrust laws for the purpose of limiting, restraining U.S. trade opportunity, and while I have read with the greatest care the defenses proposed to that—the idea that what antitrust law is applied abroad inhibits that part of our supply which comes under companies susceptible to antitrust violations—they nonetheless have very different ideas as to what those things are.

One of the things that we observed in my shop that was happening with the antitrust laws was that more and more they were

being extended to areas where they restrain more and more effective competition by U.S. firms selling abroad. Therefore, at one and the same time that that competition is being more limited through greater competitiveness in the Western World, the flow of goods to compete abroad will become greater, a greater intensity of competition. I am sure these dynamics represent a very serious challenge to the United States.

It is also very clear that the U.S. economy does not depend enough upon foreign trade. Only about 8 percent of our production goes into foreign trade. The very modestly successful European effort comes to 25 percent or more. Hence we believe that there is a serious deficiency in these laws.

The specific examples of what exists and has been curtailed are found perhaps best in the joint ventures by American companies in overseas markets. It results in the disapproval of U.S. enterprises participating in joint ventures, notwithstanding that those joint ventures are often subject to a requirement by the host country that it wishes, if it allows a particular manufacturer, to have also the power to manufacture that same item and to sell it in the world—in competition, I might say, with our own. It seems to me that this is using an internationally approved method of competition which is hardly encouraging to our interests in doing business in that way in conformance with a given country's laws.

I will not bemuse the committee with going over the detail of the bill or the detail of the claims made against those who sought to ascertain the outermost parameter of antitrust permissible in competition by U.S. firms. I cite these only to indicate, for the purpose of my testimony, the degree in which the field was left destabilized and uncertain by the effort to utilize the law.

In addition to what we have said here, the American Bar Association has been over this proposition, and while it started at the other end—disapproving—it ended up approving. The American Bar Association, in coming to its conclusions respecting the measure introduced by the chairman, has included more items which commend the bill than the bill itself carries. I believe that the rationalization respecting the bill in order to qualify its consideration by the Senate should carry what the ABA has offered and should be expanded to go that far.

The items which are listed in the bill itself are five. These are: The application of the U.S. antitrust laws in foreign commerce and their effect on the ability of U.S. enterprises to compete effectively, and the ability of U.S. enterprises to compete or deal effectively with foreign-controlled enterprises in both market and nonmarket economies.

Next is the effect of the application of the antitrust laws on U.S. relations with other countries. For example, there are barring statutes in various countries to prevent the United States inquiring into the business of foreign enterprises and even of U.S. enterprises, insofar as they are lodged in those countries.

Third is the jurisdiction and scope of the application of the U.S. antitrust law to foreign conduct and foreign parties. Now that is important because these foreign parties are subject to suit if they can be reached—and many can, of course, the very large enter-

prises—directly or indirectly, what is required by law in the jurisdiction under U.S. law.

Fourth is reciprocity between nations with respect to mutual access to markets, equal opportunity for foreign investment, and enforcement of antitrust laws. In other words, this can be done by subpena or discovery.

Fifth is the effect of the application of the antitrust laws of foreign nations to U.S. enterprises and their conduct occurring outside the territory of such foreign nations.

Now the ABA has added to that the following: The effect of the application of the laws of foreign nations to U.S. enterprises and to their conduct occurring outside the territory of such foreign nations. We have some very distinct examples of where U.S. law reaches that kind of a situation.

To this the ABA has also added the proper scope and effect of the U.S. antitrust laws dealing with sovereign immunity, the defense of foreign sovereign compulsion, and the doctrine of comity.

Next is the appropriate mechanism by which the courts and antitrust enforcement agencies may be informed of and may take into account the foreign relations implications of antitrust enforcement actions.

All of those are deemed added to this list as originally provided. In addition, our list last year included the rules governing sovereign immunity and the defense of foreign sovereign compulsion, and those are reincluded by the ABA resolution.

Mr. Chairman, I strongly commend to the committee consideration the basic draft of the bill as approved by the American Bar Association. I believe it will have a most constructive effect upon domestic and foreign commerce within and outside the United States. I believe it will enable our Government to operate in terms of equality and reciprocity with other governments in the trading scheme of the world, and I believe it will be very helpful to maintain the economic level of countries of the world interested in dealing according to law and not force nor conspiracy.

COMPETITIVE WORLD

Senator MATHIAS [acting chairman]. Thank you very much, Senator Javits. In my view you have done a signal service to this committee today and in a larger sense to the country because you have done what I would expect Senator Javits to do, and that is to orient this issue into the larger picture, into the picture of really what we are grasping for, which is the national economy and the ultimate national interest.

This is not a bill in which we are trying to provide some preferential treatment for a few large corporations, or even to provide preferential treatment for the business community at large, the private sector. What we are grasping at here is to make the United States competitive in the world so that we can protect our vital interests, and so that we can go forward as you have suggested in the various humanitarian and compassionate programs that we want to support for the benefit not only of our own people but for the benefit of all people.

Therefore, this is a program that looks to that larger interest. This is the Jack Javits hallmark that is so important.

Now you point out that there is greater competitiveness in the Western World. That certainly is true. Europe, which a generation ago was prostrate, now has a gross national product roughly equivalent to that of the United States, taking Europe as a whole. Do you think that increases the necessity for this kind of a study?

Mr. JAVITS. It makes it absolutely essential. It has been pointed out, for example, that we pay for this deficiency in our competitive system, net to Europe, just about what we pay Japan over and above our imports, that is, the exports of ours which they take. Considering the burgeoning problem that that presents in view of the deficit in our merchandise imports, it seems to me that that alone demands, in the national interest, a reconsideration of the antitrust law.

Senator MATHIAS. A Europe which was recovering from war and which was in a low state of productivity and a desperate state of poverty was a different kind of trading partner than the Europe of today.

Now one other question that I would just like to raise with you: You made the point that the U.S. economy does not depend enough on trade. We are told that if we are to pay for our oil imports by the year 2000 we will have to increase trade by a factor of 10, which seems almost inconceivable but it is consistent with your advice that we will have to depend more on trade. Do you think we can achieve that huge increase in the volume of trade if we continue to hobble American ability to compete?

Mr. JAVITS. I do not. I will only point out that among the great nations of the world our foreign trade is very small. It amounts to about 8 percent of our GNP, our gross national product. With most nations it runs up from 20, 25 percent, until it gets to Germany where it gets close to 40 percent in many lines of trade.

Now this was OK with us when we had iron ore in the Northwest and we had copper in the Rocky Mountains, and we had every conceivable kind of resource, albeit not an adequate amount to run our industrial machines under modern conditions but we had it in those days. However, that has not persisted. We are now buying half of it and paying for it right out of our hides, as the saying goes.

Hence the difference, the competitive difference, which must be recognized. We have to be much more successful and much more aggressive competitively for such of our goods as are saleable for export in open competition. If we are not, we are going to get it both ways. No economy, even one as strong as this one, can carry that for an indeterminate period.

Senator MATHIAS. Senator Specter?

Senator SPECTER. Thank you very much, Mr. Chairman.

Senator Javits, I would like to explore two areas with you briefly this morning. One turns on the prospective difference in approach internationally from domestically if we change the antitrust laws as they apply internationally. The analogy to the Foreign Corrupt Practices Act comes to my mind. We had an amendment which passed the Senate floor last week on that subject.

A concern that I have is a double standard from an ethical or moral point of view, and what our role ought to be if we really think that competition is the appropriate objective or appropriate

course of conduct, if we should not try to pursue that and push that on the international level.

Now I was concerned about the implications of an amendment to the Foreign Corrupt Practices Act which is illustrative for these purposes as well, I think. It provided that it would be a defense if an American businessman made a payment which was legal under the laws of the foreign government. We tried to sharpen that to make sure that the legality in the foreign jurisdiction was in writing, not a matter of vague custom, and to insure that would be an affirmative defense, so that the prosecutor would not have to prove its absence in his case-in-chief.

However, I have grave reservations about opening up American conduct to what is essentially bribery, even if it is lawful under the statutes of a foreign government. I have a similar concern that—being dedicated to a very basic principle that competition is the way to run an economic system—that we ought to stand by our guns there and not change it even as it would apply in the international field, notwithstanding the concerns you have very appropriately raised.

Mr. JAVITS. Senator, I think there is a middle ground, and that is the ground of reciprocity. In other words, in international agreements we often have to take account of the differences in moral tone. There is nothing condemnatory about this that makes one society unjust because it may have some indigenous development—it could be historic or traditional or economically induced—so it seems to me that the way to deal with this dichotomy, and it is a very real one, is through reciprocity.

In other words, if by agreement—let us say as broad as possible, a treaty agreement—if by agreement reciprocal conditions are brought about which do not condone immorality—which is what you say—and at one and the same time they are not like ours but they recognize the nature of other societies, then I believe it should be done. If we cannot reconcile it, then I believe we cannot do it; we cannot subscribe to others immorality on the ground that it is necessary in order to do business. On that ground anything goes.

It is my judgment that when Senators Church and Percy developed that particular measure it was developed with that concept as its ultimate, starting from where we were then.

Senator SPECTER. Well, I certainly agree with the concepts of equality and reciprocity as you have outlined them but I am troubled. You put it, as you customarily do, right to the nub when you called it condemnatory. I am concerned about the practices if a foreign government—and I do not know if they do or not—accepted bribery as a lawful course of conduct, that you can bribe a public official in a foreign government, that the United States would accede to that as a defense under the Foreign Corrupt Practices Act. Or if some form of price-fixing or nefarious antitrust violations would be accepted by a foreign government if we should engage in them even to achieve equality and reciprocity.

However, what you are suggesting is taking a look at each one to see how bad it is, essentially——

Mr. JAVITS. Well, let me give the Senator an example: Cartelization is quite acceptable in many places in the world—in the most liberal states according to 19th century liberalism, to wit, social-

ism—yet in effect it works out to be very inimical to a consumer, as is indicated by the lack of productivity in those states which is killing them. Now this is the Scylla and Charybdis which we must steer between and that is why I suggest reciprocity, hopefully multinational reciprocity.

For example, there is now beginning to be some evidence of negotiation in the OECD by the principal industrial nations along this line. That is where we should be heading.

Senator SPECTER. The other subject that I would like to explore briefly with you, Senator Javits, involves the problems which may arise in enforcing the antitrust laws in the United States if they are loosened internationally. I, for one, am very concerned about the absence of really vigorous antitrust enforcement in our country at the present time.

Antitrust cases are very hard to prove. Conspiracies are extremely hard to establish. They are not made in public or under seal, and it is a very difficult matter. If our laws are relaxed so that conduct would be lawful as it would apply in the international sphere, I have some concern that those same participants as part of the same general discussions may well—either directly or inferentially or by custom or pattern—develop contacts which would violate our own antitrust laws and make it very, very difficult to prove.

Mr. JAVITS. Well, I understand your concern. I wish to point out, however, that the antitrust laws are an evolving concept. What was a violation yesterday is not necessarily a violation today, and the rule of reason has to yield to the rule of competition and the rule of technological advance, with all respect to the law, and I use that word advisedly.

You know people are not going to "mom and pop" grocery stores in the same way that they did. Why is there a market for them just the same? Because they have struck a vein of human sympathy and personal affection which people have for very local tradesmen, "mom and pop" stores.

Therefore, I warn you against being a purist. There is no such thing as a purist administration of the antitrust laws. Nobody knows what it is yet. You are feeling your way every day. I think what the business community asks for, and it is legitimate, is what any businessman of note will tell you and I am sure you have heard it a thousand times, like I have:

> Listen, Mr. Senator, tell us the rules. Just tell us what is the deal. We will manage but tell us what is the deal. You cannot leave us to find out some years later at the penalty of treble damage suits, one penalty which lingers around, no matter how long it is, except for the statutes of limitation.

Therefore, I thoroughly agree with you, only I beg you to bear in mind the caveat that while we are built upon competition, it takes somebody to say who that is and what it is. The courts must be encouraged, not discouraged, from growing up too and realizing what are the facts of life, in order to give the people the benefit of what are modern developments without suffocating them by law.

You have to have some rough measure of justice and I believe that on the whole we have done pretty well but we have not allowed the Congress to do enough because of the fear that we would allow too much. I think we ought to have a little more confidence in ourselves than that.

Let us remember, too, that even at low figures today there are some 17 million investors in this country. No longer is it true that there is some captain of industry who owns everything. If anybody owns a fraction of 1 percent of some major company, they are rich beyond the dreams of anybody. It just cannot be done; the figures are too big.

You find with interest, for example, that a very gifted private banker like Tom Claussen of the Bank of America becomes head of the World Bank. That is a symbol of the times. Therefore, I thoroughly agree, as I say, we are built on competition; we were made by competition; we should preserve competition. However, the definition—What is competition?—is by no means some immutable article of faith.

Senator SPECTER. Thank you very much, Senator Javits. That is very helpful.

Thank you, Mr. Chairman.

Senator MATHIAS. In listening to this very interesting colloquy, I am indebted to staff for reminding me that Senator Javits made a similar argument in 1964 and warned of the economic consequences of the attitudes of the Department of Justice which were then prevailing. Unfortunately, he has been a prophet with a great deal of accuracy and a true prophet. I am sure that he would rather have been wrong than to be right and see these consequences ensue which have affected and restricted our economy.

Mr. JAVITS. Exactly.

Senator MATHIAS. Now this situation, as the colloquy indicates, is a very complicated one. I have sometimes drawn an analogy between our current condition and the story of the Gordian knot.

You will recall that when Alexander left Greece he went to the oracle at Delphi and asked what were the prospects for his expedition into Asia. The oracle was, as it always was, Delphic, and said whoever would unravel the Gordian knot would succeed in conquering Asia.

Alexander being a young man, still in the shadow of his father, realized that this was the challenge before him. Therefore, when he arrived at the shrine where the Gordian knot was kept, he paced around it and looked at it and studied it, and finally he simply pulled out his sword and sliced it in two, and he had unraveled the Gordian knot.

Well, I think today Jacob is our Alexander, and we are very grateful to him.

Thank you.

Mr. JAVITS. Thank you.

Senator MATHIAS. Our next witness will be Mr. Griffin.

Mr. GRIFFIN. Thank you, Mr. Chairman.

Senator MATHIAS. Mr. Griffin, we are glad to have you back again at this committee.

STATEMENT OF JOSEPH P. GRIFFIN, CHAIRMAN, COMMITTEE ON INTERNATIONAL ASPECTS OF ANTITRUST LAW, SECTION OF INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION

Mr. GRIFFIN. Thank you, Mr. Chairman.

Mr. Chairman, I have a prepared statement on behalf of the American Bar Association in support of S. 432. I request that it be inserted in the record.

Senator MATHIAS. Without objection, that will be part of the record.

Mr. GRIFFIN. We were, needless to say, delighted and honored that Senator Javits reviewed our recommendation and endorsed it this morning. I can think of no better endorsement we could obtain than his.

In the prepared statement, I have set forth precisely what the three additional items to the agenda proposed in S. 432 are. I will not go through that again now. I think that the important point is to give the bar's perspective on why we believe the Commission is necessary. We thought the Commission is needed for three reasons: First, the scope of the application of U.S. antitrust laws to foreign conduct and foreign parties is unclear. Second, many American businessmen contend that because the U.S. antitrust laws may apply to American firms' conduct outside the United States in the same manner as they apply to domestic conduct, American firms cannot compete effectively with foreign entities that are not subject to similar restrictions. Third, in recent years friendly foreign governments have objected to specific instances of U.S. assertions of antitrust jurisdiction over conduct outside the United States by foreign nationals. These foreign governments contend that such assertions go beyond accepted standards of international law and are unwarranted intrusions into their fundamental economic policies.

Thus we think there is a clear need for the Commission. We have suggested three amendments to S. 432. The first relates to a study of the mechanisms by which courts and enforcement agencies may be informed of and may take into account the foreign relations implications of antitrust enforcement actions. As the Senator is well aware, this has been a point of considerable friction resulting in the enactment of a number of so-called blocking statutes, nonenforcement statutes, and clawback statutes.

Our second suggested addition is in paragraph 5 of our recommendation: That is that the Commission should study the application of the laws of foreign nations to U.S. enterprises. The idea here would be to conduct a comparative law analysis, looking at how foreign nations that have the effects doctrine and some notion of extraterritoriality deal with that problem, what solutions they have obtained, whether we can learn anything from their experience.

The third item, as Senator Javits pointed out, is the addition taken from an earlier version of this bill and from the companion House bill of a list of specific items to be studied, such as the defenses of foreign sovereign immunity, foreign sovereign compulsion, and comity.

We are, of course, aware that the problem here is really a generic one: That is, it is not limited to the antitrust area. It arises in perhaps as many as 25 different areas of law. When the bar association adopted its recommendation and report, it was focused on the legislation then pending which was limited to the antitrust laws. Therefore the recommendation of the association was limited to the existing legislation.

The proposals that have been made by Assistant Attorney General Baxter, Legal Adviser Robinson, and I believe will be made today by Mr. Rosenthal on behalf of the Chamber of Commerce—that the Commission should be broadened to include the generic problem of extraterritoriality—are certainly consistent with the thrust and intent of the American Bar Association's recommendation.

However, I think there is one point that should be made clear. Assistant Attorney General Baxter, in his testimony before the House subcommittee on November 19, took the position that if Congress decides not to pursue the generic approach then there should be no commission at all because on some sort of cost-benefit analysis, a commission limited to antitrust issues would not be worth the cost.

I think that position is inconsistent with the bar association's position. It is our belief that the issues are sufficiently ripe and complex that a comprehensive, objective study should commence as promptly as possible, at least on the antitrust facet if not on the entire generic problem, and that it would be a mistake for Congress to follow Mr. Baxter's advice and look at the alternatives as dealing with the entire generic issue or not dealing with it at all.

In this connection two objections have been raised against the proposed Commission. One is that it is simply another Commission that will run the normal Commission course, that is, it will spend a lot of money, will generate a lot of paper, and will be quickly forgotten. Therefore—again because of a cost-benefit analysis—is not worth doing. I think we disagree with that conclusion.

We do not see that it is an all-or-nothing proposition. For instance, to the extent that cost is a consideration, it perhaps might make sense for the relevant congressional committees to conduct an information-gathering-type operation through hearings like these, to get on the record the concerns of the private bar, the business community, the foreign governments, and so forth.

Perhaps that raw material and data could then be turned over to a group of experts appointed to the Commission who would be asked to review the material and come up with proposals and recommendations. That would seem to be an intelligent compromise. The Commission staff could be smaller. Perhaps the Commission's duration would be shorter because it would have at least a bedrock of data and material already gathered which it could deal with and would not have to undertake that task itself.

However, if it is looked at purely as a matter of cost effectiveness, I would submit that I think the Senate's last cost estimate of this Commission was something on the order of $500,000, and I would suggest that the money spent by businessmen, foreign governments, and the U.S. Government itself on these issues makes the sum of $500,000—or twice that amount——

Senator MATHIAS. It is only one small round of litigation.

Mr. GRIFFIN. That is right. That is one motion to dismiss in the uranium case. Therefore, I do not think that it is really a very persuasive argument to say that if we do not spend $500,000 or $1 million on this somehow a benefit will inure to the public. I guess the assumption is all that money will be spent by industry and by foreign governments and by the Justice Department and the State De-

partment and the Commerce Department trying to deal with "clawback" statutes and blocking legislation and protests by foreign governments, and that somehow that is better than money up front that is easily identifiable. We strongly disagree with that.

Mr. Chairman, that would conclude my statement. I would happy to try to answer any questions that you might have.

Senator MATHIAS. Mr. Griffin, we appreciate your being here. I am very glad to have the suggestions of the American Bar Association. I think they are constructive and valuable and certainly will view them very sympathetically. I might also say that as we progress through the legislative process, if there are other ideas or suggestions you have they will be equally welcome.

I know that you have a time problem and another engagement, so I will not engage you in any long colloquy but let me just ask you this, very briefly: One of the complaints that is made about the antitrust laws, particularly by the business community, is that the law is ambiguous, that it is vague, that it leaves the business leadership in a state of uncertainty, and therefore they are inhibited from taking those actions which might lead to a more productive economy. They are inhibited even from taking ordinary businessmen's risks.

On the other hand, the view is held—and sometimes within the Justice Department—that in fact the laws are really very clear and unambiguous, and that it is just a lot of high-priced Washington lawyers who want to protect their client relationships and are always hedging their advice and saying: "Well, you cannot be really sure about this." What do you think about that?

Mr. GRIFFIN. First, in the nature of a disclaimer, I am a Washington lawyer. I do not know whether I am high priced or not but——

Senator MATHIAS. Well, you better be; you might as well be.

Mr. GRIFFIN. I will try to be. [Laughter.]

Leaving that aside, I would disagree with the conclusion made by those people. I think the best example is the development of the jurisdictional rule of reason in the *Timberlane-Mannington Mills* litigation, where you have a list of at least 10, and by some counts 15, factors that a court should consider in deciding whether or not to exercise subject matter jurisdiction in one of these cases.

Therefore, if you are a private attorney, or for that matter a government attorney, trying to advise your client as to whether or not a particular type of conduct would fall within the antitrust laws or would be subject to challenge, all you have to do is look at each of those 15 factors, make an independent judgment as to each one of those 15 factors, then try to put yourself in the place of the judge and decide how he would do it, and then advise your client.

One of your witnesses later today, Kingman Brewster, who is an eminent authority in these fields, has called that test "uncounselable law," meaning it is simply not the kind of law that is counselable to a client. You always in that situation have to say to your client: "Well, here is how I might balance it," or, "Here is how the cases in the field seem to come out but they all are extremely fact specific, and the best we can tell you is that it is more probable than not that A will happen or B will happen." That is not a great deal of assurance to businessmen.

The point Senator Javits made concerning the incredible amounts of liability, the estimated damages in the uranium cartel litigation were $6 billion, is relevant here. A number of the foreign governments expressed the view that if the companies within their jurisdictions were held liable, those companies would be bankrupt and those whole industries in those countries might well collapse. That is the kind of liability that a businessman looks at, and he has his lawyer tell him that it is more probable than not that it might happen but, who knows, you may draw a strange judge.

Senator MATHIAS. Of course, as you get into doing business in a foreign climate or in several foreign climates, those factors of uncertainty are compounded.

Mr. GRIFFIN. It is very much like a blind man walking through quicksand.

Senator MATHIAS. Now one final question: If you had a crystal ball, what do you think the most important product of the International Antitrust Task Force would be? What would be the most valuable area of recommendation, do you think?

Mr. GRIFFIN. I think the area of greatest friction is the area of assertions of jurisdiction and defenses to jurisdiction. I think there are two kinds of recommendations that a commission could make: One would be as to specific legislation that would probably be amendatory of existing statutes in the United States but I think the other—and perhaps equally important, particularly in the short run—would be for mechanical, procedural, technical, legal ways to at least minimize these conflicts.

We have several examples of how this has been done in the past with the Hague Conventions on service of process abroad and taking evidence abroad, They are very technical, mechanical solutions but go a long way to reducing international tensions and preventing the kind of head-on clashes that we are seeing today.

Senator MATHIAS. Thank you very much, Mr. Griffin. As I remind you, we will keep the record open for a reasonable time for any further thoughts that you or the bar association may have.

Mr. GRIFFIN. Thank you very much, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF

JOSEPH P. GRIFFIN, CHAIRMAN
COMMITTEE ON INTERNATIONAL ASPECTS OF ANTITRUST LAW
SECTION OF INTERNATIONAL LAW

AMERICAN BAR ASSOCIATION

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Joseph P. Griffin. I am an attorney in the private practice of law in Washington, D.C. and Chairman of the Committee on International Aspects of Antitrust Law of the International Law Section of the American Bar Association. I appear today, at the request of Senators Thurmond and Mathias, on behalf of the American Bar Association and am pleased to express the Association's support for S. 432.

In August 1981, the House of Delegates of the American Bar Association adopted the following Resolution, which was sponsored by the Section of International Law and co-sponsored by the Section of Antitrust Law:

BE IT RESOLVED, that the American Bar Association recommends to the President and the Congress

> The establishment of a bipartisan Commission on the International Application of the United States Antitrust Law, composed of twenty members to be appointed by the President, eight from the private sector, four from the Senate, four from the House of Representatives, and four from the executive branch (including the Assistant Attorney General in charge of the Antitrust Division and the Legal Adviser of the Department of State), charged with studying and reporting within eighteen months on:
>
> 1. The application of the United States antitrust laws in foreign commerce, and their effect on -
>
> (a) the ability of United States enterprises to compete effectively abroad; and
>
> (b) the ability of United States enterprises to compete or deal effectively with foreign controlled enterprises in market and nonmarket economies;

2. The effect of the application of the United States antitrust laws on United States relations with other countries;

3. The jurisdiction and scope of the application of United States antitrust laws to foreign conduct and foreign parties;

4. The issue of reciprocity between nations with respect to mutual access to markets, equal opportunities for foreign investments, and enforcement of antitrust laws;

5. The effect of application of the laws of foreign nations to United States enterprises, and to their conduct occurring outside the territory of such foreign nations;

6. The applications of United States rules of court relating to the enforcement of antitrust laws in the context of international transactions (for example, the "per se" and "rule of reason" doctrines);

7. The application of the United States antitrust laws to joint ventures, mergers, acquisitions, and distributions and licensing arrangements between and among the United States and foreign based enterprises;

8. The proper scope and effect of the following on the application of the United States antitrust laws:

(a) the rules governing sovereign immunity;

(b) the defense of foreign sovereign compulsion; and

(c) the doctrine of comity;

9. The appropriate mechanisms by which the courts and antitrust enforcement agencies may be informed of, and may take into account, the foreign relations implications of antitrust enforcement actions.

This Recommendation was drafted after my Committee, the Section of International Law's Ad Hoc Task Force on the Extraterritorial Application of U.S. Law and other relevant committees of the Association had analyzed and debated S. 432 and a similar House bill, H.R. 2459. There was virtually unanimous agreement that the creation of the type of Commission envisaged by S. 432 would be a very constructive step.

Three related factors contributed to the conclusion to support the establishment of such a Commission. First, the scope

of the application of U.S. antitrust laws to foreign conduct and foreign parties is unclear. Second, many American businessmen contend that, because the U.S. antitrust laws may apply to American firms' conduct outside the United States in the same manner as they apply to domestic conduct, American firms cannot compete effectively with foreign entities that are not subject to similar restrictions. Third, in recent years friendly foreign governments have objected to specific instances of U.S. assertions of antitrust jurisdiction over conduct outside the United States by foreign nationals. These foreign governments contend that such assertions go beyond accepted standards of international law and are unwarranted intrusions into their fundamental economic policies.

Because of the widespread support for a Commission within the relevant committees, discussions within the American Bar Association quickly turned to the proposed agenda for such a Commission. The agenda set forth in the above-quoted Recommendation is very similar to that set forth in Section 3(b) of S. 432. However, the ABA Recommendation contains three new items.

First, Paragraph 9 of the Recommendation suggests that the proposed Commission should study and report on "the appropriate mechanisms by which the courts and antitrust enforcement agencies may be informed of, and may take into account, the foreign relations implications of antitrust enforcement actions."

Our courts, having determined that Congress in the Sherman Act went to the full extent of its power under the Constitution and that international law permits exercise of extraterritorial jurisdiction pursuant to the "effects" doctrine, have been struggling to determine when principles of comity would suggest declination, or abstention from exercise, of jurisdiction in antitrust cases. The difficulties for the

courts are evident from the cases; the solutions are not so clear. Basic questions of fairness toward litigants arise where the outcome of litigation is dependent on perceptions of the appropriate reach of our antitrust enforcement systems, of the weight to be given foreign governmental protests and statements of interest by amicus presentations, and of the extent to which our courts must press litigants to seek changes in foreign governmental decisions. These problems are particularly acute in litigation which does not involve the U.S. Government as a party. For example, in affirming the dismissal of the suit brought by the International Association of Machinists and Aerospace Workers (IAM) against the price fixing and other anticompetitive activities of the Organization of Petroleum Exporting Countries (OPEC), the U.S. Court of Appeals for the Ninth Circuit stated:

> The record in this case contains extensive documentation of the involvement of our executive and legislative branches with the oil question. IAM does not dispute that the United States has a grave interest in the petro-politics of the Middle East, or that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area. It is clear that OPEC and its activities are carefully considered in the formulation of American foreign policy.
>
> The remedy IAM seeks is an injunction against the OPEC nations. The possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action and the remedy sought.

[IAM v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981)]

In another widely publicized case involving the international uranium cartel, the trial judge stated:

> Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable

> conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.

[In Re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979)]

A final example is Conservation Council of Western Australia v. Aluminum Company of America, 518 F. Supp. 270, 275 (W.D. Pa. 1981), in which the trial court stated:

> Extraterritorial application of American law is naturally a matter of concern to the other countries involved, and at some point, the potential international repercussions of asserting jurisdiction outweigh the impact of particular foreign conduct on United States commerce. . . . However, neither the Sherman Act nor its legislative history defines this point.

These statements illustrate the complex problems faced by courts in learning of, and properly taking into account, the foreign relations implications of antitrust cases.

Agencies of the executive branch and independent regulatory agencies ("Agencies") have authority, by executive order and legislation, to enforce U.S. laws by issuing subpoenas or investigative requests to persons in foreign nations for information located in those nations. They also have the ability to initiate administrative and judicial proceedings against foreign individuals and enterprises located abroad for violations of U.S. law involving conduct primarily or even totally taking place outside of the territory of the United States.

There are more than two dozen distinct fields of U.S. law which are enforced in U.S. foreign commerce by various ex-

ecutive branch and independent regulatory agencies. With a few exceptions, most of these Agencies are not required and do not choose to give prior notice to officials of the State Department or others responsible for implementing the foreign policy of the United States, or to concerned foreign governments, even when the interests of an important ally would be directly affected by proposed Agency action. Without prior knowledge, U.S. foreign policy officials can be embarrassed in their regular dealings with foreign governments. Foreign officials are often chagrined not to be given the opportunity for diplomatic consultations. The commencement of an agency enforcement action generally preempts such consultations and, even where they take place, undercuts their utility.

While the Agencies preserve law enforcement independence by refraining from notification and consultation, they do so at the cost of not considering broader international implications or the variety of possible law enforcement responses available to them, and sometimes make less-considered judgments.

At least in part because they believe their views have not been given due consideration by enforcement officials and courts, some of the United States' closest allies and most active trading partners, including Australia, Canada, France, the Netherlands and the United Kingdom, have all enacted "blocking" laws barring compliance with U.S. court orders for the production of documents and discovery. Formal notes of protest have been received concerning U.S. antitrust enforcement efforts. The United Kingdom has even enacted "clawback" legislation designed to allow in certain circumstances the recovery back by a U.K. national of two-thirds of any treble damage award by a U.S. court against that U.K. national.

For these reasons, the American Bar Association recommends the type of inquiry outlined in Paragraph 9 of its Recommendation be included on the agenda of the proposed Commission.

The second addition to the proposed Commission's agenda of items to study recommended by the American Bar Association is contained in Paragraph 5 of the Recommendation, "the effect of application of the laws of foreign nations to United States enterprises, and to their conduct occurring outside the territory of such foreign nations."

The goal of such a study would be to determine via a classic comparative law analysis whether other legal systems have developed solutions to some of the problems under study and, if so, whether such solutions are transferable to the American legal system.

The third addition to the study agenda set forth in S. 432 is contained in Paragraph 8 of the Recommendation and is very similar to Subsection 3(b)(5) of H.R. 2459. The Recommendation is that the Commission study:

> The proper scope and effect of the following on the application of the United States antitrust laws:
>
> (a) the rules governing sovereign immunity;
>
> (b) the defense of foreign sovereign compulsion; and
>
> (c) the doctrine of comity

The American Bar Association also recommends the appointment of eight rather than six members to the Commission from the private sector in order to obtain a wider but not unwieldy spectrum of views.

Of course, the issue of the application of U.S. law to persons and conduct outside the United States ("extra-territoriality") is not limited to antitrust. In more than 25 fields of U.S. law, e.g., Arab boycott, export controls, environmental, securities, and tax, similar issues are raised.

The Report that accompanied the Recommendation of the American Bar Association, quoted at pages 1-3 of this Statement, made the point that the issues raised by the application of U.S. law to persons, conduct and information outside

the United States are generic to law enforcement in U.S. foreign commerce as a whole and acknowledged the need for a generic review of these issues. Support for S. 432 was viewed by the Association as a first useful step in initiating such a generic review. Thus, the position taken by Assistant Attorney General Baxter, Legal Adviser Robinson, and Mr. Rosenthal on behalf of the Chamber of Commerce of the United States, that the focus of the Commission created by S. 432 should be broadened to include the generic problem of extraterritoriality is consistent with the thrust of the American Bar Association's Recommendation.

Nevertheless, the Association's Recommendation rejects the suggestion made by Assistant Attorney General Baxter in his testimony of November 19, 1981 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, that if Congress decides not to pursue the generic approach, legislation such as S. 432 creating a Commission limited to a study of antitrust law should not be adopted. The relevant issues are sufficiently ripe and complex that a comprehensive, objective study should commence promptly as to the antitrust facet if such a study of the entire problem is deemed by Congress to be impractical or untimely.

Senator MATHIAS. Our next witnesses will be a panel representing the administration, the Honorable Sherman Unger, General Counsel of the Department of Commerce; the Honorable William F. Baxter, Assistant Attorney General for the Antitrust Division of the Department of Justice; and the Honorable Davis Robinson, Legal Adviser to the Department of State.

Gentlemen, I believe you have agreed that Mr. Unger will lead off. Let me say to all of you that your written statements will be included in the record, so you can summarize them as briefly as you like.

STATEMENT OF SHERMAN E. UNGER, GENERAL COUNSEL, U.S. DEPARTMENT OF COMMERCE

Mr. UNGER. Thank you, Mr. Chairman.

I am pleased to be here this morning to present our comments on S. 432. Unfortunately, because of budgetary constraints the Department of Commerce cannot at this time express support for the formal creation of the proposed new Commission.

Senator MATHIAS. I am grateful to you for preceding that statement by calling it unfortunate.

Mr. UNGER. Thank you. That was a personal addition.

Senator MATHIAS. Well, it was noted by the committee.

Mr. UNGER. The type of study that is envisioned would be, in our opinion, extremely helpful. It would be helpful to the Department of Commerce in making increases in our exports. If we can improve our relations with our principal trading partners, it is good for the Nation in every respect.

Today we have foreign governments objecting to the extraterritorial effect of many of our laws which make economic actions taken by an American company within their borders a violation of American law. While the study as currently conceived would deal primarily with antitrust laws, we believe it is generally agreed and we feel that the work must be expanded to deal with the extraterritorial effect of all of our laws.

We and our major trading partners face a series of difficult legal and economic issues because of the reach of a number of our laws. It is not just the antitrust laws. Again, in the last few years we have passed a few more of those; a number of those laws are within the Department of Commerce. I believe the Attorney General said not so long ago that we export three things: jazz, jeans, and our laws. I understand that is right when I talk to our trading partners.

Senator MATHIAS. Mr. Unger, I am reluctant to do it but I have no choice. That buzzing means that they are in the final stages of a rollcall vote on the Senate floor, so I will suspend the hearing for as few minutes as possible. I will ask the staff to request that Senator Specter begin immediately, as soon as he gets back from the rollcall, and we will stand in recess for a minimum period.

[Brief recess.]

Senator MATHIAS. The committee will come to order.

Mr. Unger, you will resume?

Mr. UNGER. Mr. Chairman, the Department of Commerce and this administration continue to believe that export trading company legislation such as that contained in S. 734, which was unani-

mously passed by the Senate on April 8, 1981, can help remove much of the uncertainty that the business communities felt about the application of the U.S. antitrust laws to export activities.

We believe it will provide new and specific certification processes which will give exporters advance knowledge of the acceptability of proposed conduct. It will clarify the permissible bounds of joint efforts by U.S. companies in promoting exports. Its provision of greater clarity will be direct and immediate. As a result, we see no further need for the extended study of export promotion provisions such as those contained in S. 734.

For example, some of the problems we face today occur when American companies wanting to export to foreign countries are sometimes required by that country's government to be a noncontrolling partner in a joint venture with a native company. The foreign governments sometimes insist, as a further consideration to any trade rights, that the American corporation distribute the goods of the joint venture in the U.S. market in a prescribed manner. American companies sometimes forego trade opportunities because of the required distribution of imported goods that might bring them in conflict with our antitrust laws.

Studies of this and similar issues could expand our future trade by clarifying corporate liability under our own antitrust laws for those emerging distribution arrangements. Consideration should be given to both the conflicts that these laws create with countries which deny our jurisdiction to regulate economic activity, and to the competitive disadvantages that are suffered by American business.

The increasingly effective ability of other nations, especially our major trading partners, to compete in international markets is being accompanied by equally vigorous attempts to apply their laws to business ventures and transactions involving American interests. Let me give you two examples that come to mind to us:

The British Monopolies and Merger Commission in September 1981 opposed the acquisition of a native engineering and construction firm, Davy Corp. Ltd., by an American company, ENSERCH Corp. They did so primarily because of the British concern that the reach of our Foreign Corrupt Practices Act would put the resulting entity at a competitive disadvantage in seeking contracts in Third World countries whose customs and laws might accept conduct which would be prosecuted under the U.S. law.

Recently, very recently, the well-established Pulp, Paper, Paperboard Export Association of the United States has sought Government intercession in a suit brought by the Commission of the European Communities. The association's primary concern is that the EC Commission has turned to a lawsuit against one Webb-Pomerene association as a means of establishing rules concerning the legality of such associations under the Treaty of Rome. The association urges that the issue be treated instead as a subject for diplomatic consultation.

I am convinced that such activities of our principal trading partners are a natural reflection of their increasing economic power and their success in competing internationally. I am equally convinced that it argues persuasively for beginning now to lay the foundations for relevant studies so that our Nation can develop the

most effective recommendation for necessary responses, including legislative initiatives, for equitable resolution of the issues involving transnational application of the laws in the decade of the eighties, to and from the United States.

Finally, consistent with the recommendations to expand the number of Federal statutes whose extraterritorial aspects are to be studied, we recommend that the Department of Commerce become an active participant in any such study. The Department's inclusion is appropriate because of our particular responsibilities in the international trade area as well as our experience with transnational application issues in the export administration and antiboycott areas.

I thank you for the opportunity to express my views and would be happy to take any questions.

Senator MATHIAS. Thank you, Mr. Unger. I will reserve questions until after all the members of the panel have spoken.

Who would like to go next?

STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. BAXTER. Thank you, Mr. Chairman.

Because my statement will be inserted in the record, as I understand it, I will give a very brief summary.

Senator MATHIAS. It has been.

Mr. BAXTER. The Department of Justice is unable to support S. 432 as it is presently written primarily because, in our view, it has too narrow a focus. It is confined in its focus to the antitrust laws. We see little difference between the extent to which the antitrust laws give rise to problems of foreign conflict and the extent to which a wide variety of other laws have caused such problems, at least in recent years.

Even if the bill were broadened somewhat, we would have problems of a rather different kind. The basic, underlying difficulty in the area about which we are talking is not, as is often suggested, a problem about some nations applying their laws extraterritorially, but rather involves a question as to which nation's laws will apply to what transactions. Our trading partners are not so much suggesting that our laws should not apply as they are that theirs should, and there can be no question that they have a claim as good as ours, probably reciprocal to ours, for the application of their laws.

I think this basic problem of legislative jurisdiction will be worked out satisfactorily only by a process which more nearly resembles negotiation with our foreign trading partners than an academically oriented study commission. In particular, I think until we have a clearer idea than we now have of precisely what our trading partners perceive to be their central and strongest interests, and until we have a clearer notion of the areas in which they simply do not feel they can possibly give up and those in which they conceivably could, we will not be in a position to go forward in a very constructive way with the process of resolution.

The process I have in mind, it is instructive to remember, has never satisfactorily been resolved in the United States. The laws of the 50 States still clash in many instances, although the problem

was foreseen in the Philadelphia Convention of 1789, and our founders took the precaution to write a full-faith-and-credit clause into our Constitution.

No progress has been made on that problem. Congress has never seen fit to legislate on it. The Federal courts have never exercised their powers under the full-faith-and-credit clause. We are still where we were in 1789 with respect to the problem of interstate conflict of laws. We will have to do better than that internationally but it is not at all clear to me that a study commission, at least in advance of further exploration of this question of perceived fundamental interests of the trading partners, would be the way to start.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Baxter.

At least we cannot make against you the charge that Governor Ray made recently. A group of Governors were concerned about the level of business activity, particularly exporting activity, and these Governors arranged to have a meeting which was to be a free exchange of ideas between Federal officials who are in the business of regulating trade and the executives of a number of corporations in pursuit of trade.

At one of the meetings they held, which I believe was in Seattle, the statement was made on behalf of the Federal Government—I am told this is an accurate quote—that the antitrust laws, far from being a hindrance, are an asset to exporters. Well, the catcalls, the laughter, the derision which rocked the room did not die down for some time, and I think that convinced the regulators present that they had more than just a public relations problem in this respect.

The second meeting was in Iowa, and on that occasion they solved the problem by simply making their statement so long that no questions or discussion was permitted afterwards; the time had run out. We cannot make that charge against you today, for which we are grateful, but we will come back with some questions after Mr. Robinson has had his opportunity at bat.

STATEMENT OF DAVIS R. ROBINSON, LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. ROBINSON. I thank you, Mr. Chairman, for this opportunity to appear and for the inclusion of my prepared remarks on behalf of the Department of State in the record with regard to S. 432.

The bill addresses a part of a problem that has occupied, in my view, a surprising amount of time during my initial 4 months as the legal advisor. I have indeed been surprised at the frequency of conflicts between exercises of U.S. economic regulatory jurisdiction, including administration of the antitrust laws, and the laws and interests of foreign nations. It has, I would say, become almost a weekly event that a new issue has come before my desk.

While antitrust issues in this context are longstanding and familiar, I believe that conflicts in other areas are equally significant to U.S. interests and require an equal measure of consideration. In the antitrust field, although notice and consultation procedures have eased the dimensions of the problem in certain cases, the private treble-damage action persists in posing problems.

In such cases, private parties may find it necessary or advantageous to implicate foreign governmental interests without regard

to considerations of comity which are often taken into account by U.S. Government agencies in initiating or conducting litigation. Thus, in the private treble-damage case, prior notice and consultation among governments are not very effective. Presently we can only look to the courts for further development of principles in this area. While cases such as *Timberlane* and *Mannington Mills* have represented a start, in our view, our law in this area is relatively undeveloped and much remains to be done.

Assistant Attorney General Baxter has stated that discussion and agreement with foreign antitrust authorities regarding the proper extent of each party's antitrust jurisdiction is the best and perhaps the only way to avoid conflict. The process of defining national spheres of antitrust enforcement jurisdiction will be difficult but we certainly applaud Mr. Baxter's determination to embark upon this process.

I might add that in other areas outside of the antitrust field, we believe that we have a fairly good idea of what the concerns of other nations are. We have had a series of meetings, for example, in the last couple of months with our British colleagues. A recent 2-day session brought very clearly to light their concerns both as to matters of international law and as to the specifics of given laws and regulations of the United States.

In areas other than antitrust, we face a variety of important jurisdictional conflicts with foreign governments. Many governments, including some of our closest allies, view U.S. regulation of persons or conduct within their territory as affronts to their jurisdiction and to their national interests. It might be useful, Mr. Chairman, if I were to give you some illustration of the varied types of cases that have arisen in recent months.

The United Kingdom, for example, has taken vigorous exception to the application of U.S. foreign asset control regulations as well as to the application of U.S. antiboycott legislation to United Kingdom subsidiaries of U.S. parent corporations. The United Kingdom similarly protested the application of U.S. export control retransfer requirements to United Kingdom firms. The British have also objected to the scope of our commodities regulations.

The Canadian Government protested U.S. regulation of rail-and-container carriage in or through Canada. Several governments have expressed disquiet over the application of U.S. blocking measures directed at Iranian property within their territory prior to the release of the hostages, and have also taken exception to enforcement of our securities laws in certain international transactions.

The Swiss Government has expressed concern over foreign investigative activities within Swiss territory that violate Swiss law. We have just had a case where private U.S. counsel were detained and their documents seized in Switzerland because they conducted a deposition there without authorization, contrary to Swiss law.

Finally, demands for information by a U.S. regulatory agency prompted the United Kingdom to invoke its Protection of Trading Interests Act for the first time to block compliance with the agency's order.

All of these disputes have common consequences. They have a cost for U.S. foreign relations. They may deplete the good will of a foreign government, as well as its willingness to cooperate with us

on other projects of importance. Such conflicts have other costs for us. They require the time and effort of specialized attorneys and diplomats to sort out the pieces when conflicts occur. In the meantime, the U.S. regulatory interest that prompted our action in the first place may be thwarted.

What are we doing, Mr. Chairman, at this point to endeavor to alleviate this problem? We are encouraging the widespread adoption and practice of prior notice and consultation, both with the State Department and with foreign governments, in connection with regulatory or enforcement actions by U.S. agencies which affect foreign interests. We think that once instituted, these practices can, over time, help to avoid unnecessary conflicts. Furthermore, in the development of internal U.S. Government policy the State Department is trying to insure that the political and economic costs of regulating foreign parties and interests are fully appreciated.

Such measures may help but they may not prevent conflicts of jurisdiction from arising. There are times when Congress or executive agencies find it necessary to regulate conduct abroad subject to U.S. jurisdiction in order to satisfy significant national needs and policies. Because of the variety of laws, agencies, and regulatory programs involved, it is difficult to articulate and implement a consistent Government-wide approach to avoidance or better management of the ensuing conflicts of jurisdiction.

We will continue the measures I have described. However, I am persuaded that this administration also needs to undertake a systematic assessment of the range of problems and interests involved in conflicts of jurisdiction. A review of this kind would dramatize and confirm to foreign governments and to concerned private observers our determination to avoid—or better manage, at least—conflicts of international economic regulatory jurisdiction.

The Presidential Study Commission, proposed in S. 432, is one way to pursue these objectives. However, as my colleague Sherman Unger has indicated, I, unfortunately, cannot say today that the Department of State is convinced that a Commission is the best way to proceed.

We do believe, however, that the question of conflicts of jurisdiction in international transactions in our increasingly interdependent world requires prompt attention. We are looking into all of the available alternative means to determine how to do this most effectively. In short, the Department of State and the administration are determined to develop a more coherent and appropriate approach to this complex problem.

I thank you, Mr. Chairman, and will be happy to address your questions.

JOINT VENTURES OVERSEAS PROLIFERATING

Senator MATHIAS. Thank you, Mr. Robinson.

Let me say that I attach great importance to the composition of this panel. I think it is extremely vital that we do have not only the views of the Justice Department but the views of the Department of State and the Department of Commerce because this is a national problem of major proportions.

I spent Monday and Tuesday in Brussels, where the conversation largely revolved around trade questions but very close to the surface of those conversations were the related questions of our whole foreign policy relationship with Europe, our defense arrangements which involve our NATO allies, all of this bound up in the trade question and our international economic relationships which are so important to us. It is a Government-wide problem, and so the fact that you are here as a panel is of great significance and I think it underscores the broad view of the problem taken by Senator Javits this morning. Let me just ask you one or two very brief questions now. It is our information that joint ventures overseas have been proliferating in the past several years. How important do you think those joint ventures are for American business, and to what extent do our antitrust laws play a role or fail to play a role in this area?

Mr. BAXTER. I think there are a wide variety of circumstances, Mr. Chairman, under which joint ventures are very important to American business. Not infrequently, the economies of scale of ocean shipping or the development of distribution systems overseas will be very substantially greater than the scale economies that are necessary to manufacture and distribute in the United States, for example. Under those circumstances, it is very desirable for a group of companies to be able to get together in a joint venture and exploit the export opportunity through such a vehicle. Of course, that is completely appropriate under U.S. antitrust law, sensibly interpreted.

There have indeed been some lower court opinions over the years that have even gone so far as to suggest a per se illegality approach to joint ventures between horizontally related companies; they have, however, been few in number. Those decisions, I think, are now thoroughly discredited by more recent decisions of the Supreme Court.

On the other hand, even if there is merely an erroneous perception that those ghosts of past antitrust decisions stand as a barrier, I see no particular reason why legislative clarification—as, for example, is represented in the presently pending export trading legislation—is not desirable in order to assure business enterprises that joint ventures of appropriate scope are indeed perfectly permissible under our laws.

Senator MATHIAS. Do any of the rest of you want to comment?

Mr. UNGER. I agree with my colleague from the Justice Department and I note that he says "perfectly permissible under our laws." We have to be aware that the other countries of the world are looking at some of these joint ventures and some of the authority granted by Webb-Pomerene, and some of the authority that would be granted by export trading companies that could be considered an abuse of their laws.

I would like to take this opportunity to say that I do not think the three of us are very far apart. We may have sounded a little bit in discord but it is my feeling that a Commission or a study group would resolve the position of this country, so that we would be more able to enter into the type of negotiation that Bill Baxter suggests.

As a matter of fact, I would endorse everything that Mr. Baxter says with maybe one little glitch. I would suggest that maybe it

would be helpful for us to determine our position before we enter negotiations, and to "understand" our position before we "understand" the position of our trading partners, and that this type of study would accomplish that.

Senator MATHIAS. Well, that was a point I was going to raise with Mr. Baxter before we let him go, even on our accelerated agenda. Maybe, if Mr. Robinson does not mind, let me direct that question to Mr. Baxter right now.

You say, No. 1, the Justice Department would not approve the bill because its scope is too narrow, limited to antitrust considerations. However, you also then said that even if we were to expand it, perhaps along the lines suggested by the American Bar Association, that you still would not approve it because then it gets into areas that really ought to be resolved by negotiation; and that we could not have negotiations until we had a clearer idea of the central interests of our negotiating partners, if I recall your statement.

That precisely was the question I wanted to raise: What reason do you have to believe that we have any very clear ideas of our own central interests in this matter? One of the purposes of the Commission would be to try to define what our central issues really are.

Mr. BAXTER. Well, I understand that, Mr. Chairman, but I expect that when and if some satisfactory resolution is reached with our trading partners, it will have strong reciprocal features. For example, they will say, "As for export trading companies"—since we happen to be talking about them—"why, we will honor yours. They can have all sorts of information exchanges and do what they wish but, for example, they may not engage in price-fixing in our economy." We would reciprocally say, "All right, we will take the same attitude toward your export trading companies." On a problem-by-problem basis, the rules and scopes of jurisdiction will turn out to be more or less mirror images of one another.

If that is right, and I strongly believe that it will turn out to be right, the process of articulating one's own interests is not unilateral. You really have to find out what they feel strongly about in the process of thinking about what you will decide are your own central interests. It seems to me that we have not had—at least I have not, and so far as I am aware nobody at the Justice Department has had—even these preliminary and informal bilateral conversations with our major trading partners that do have antitrust authorities, to begin the process of sorting out how they see this problem of international jurisdiction. I just think some of that, more certainly than I have done, would be helpful before we began the process of trying to state in any definitive way our own central interests.

Senator MATHIAS. I do not want to stretch this out but I would make only this point, and be glad to have your comment on it: I would not really envy the position of those representatives of the United States who sat down at a table—even for, in your phrase, preliminary, informal, bilateral conversations—I would not envy their position even going point-by-point, when they know there are 100 U.S. Senators looking over their shoulders on every one of these issues, and they cannot be sure what the national position really is on these issues.

Any agreement—however preliminary and informal—that they bring back has to be terribly tentative because there is not really a national consensus on any one of them. The whole purpose of the Commission would be to help us define our own thinking and at least to agree on a data base, which I believe is not even agreed on today. Therefore, you would have the whole debate following the negotiations which might negate them, and we would lose another 10 years in which the U.S. economy may be suffering.

Mr. ROBINSON. Could I answer, Mr. Chairman?

Senator MATHIAS. Mr. Robinson? Yes.

Mr. ROBINSON. I agree with my colleague, Mr. Unger, that I do not think there is a wide disparity of views among the three of us. Speaking for myself, I see the need for these bilateral negotiations as well. Of course——

Senator MATHIAS. Certainly, let me say to you and to Mr. Baxter, I do not disagree with that. I would welcome those, and I think if they can go along concurrently that would be fine. They might be a helpful kind of process.

Mr. ROBINSON. I would indeed again refer to these British talks, which I think without any breach of diplomatic confidentiality I can tell you were, at least from our perspective, extremely informative, educational, and productive. They covered a wide number of laws and regulations. We hope that they will set a course which will lead to some productive results. Therefore, I have no doubt as to the efficacy and wisdom of having negotiations bilaterally.

I think at State—because this issue seems to arise with such frequency and with such vehemence in so many areas—that we perceive an urgency and magnitude to the problem that does justify some mechanism to review the overall problem on an internal basis as you are suggesting. Whether a Commission is the answer at this moment is not only a budget question. It may also be a question of whether internally we have our own act together in terms of appraising this great plethora of laws and regulations which do impact on this area. However, we do believe it is an urgent matter. It does require attention.

Senator MATHIAS. I welcome that view, and I would hope that you would continue your collegiate existence as a panel outside this room and continue to discuss it. I am delighted with the feeling that there is not a wide diversity of view among you.

I think it is urgent, as Mr. Robinson says, and we have no pride of authorship here. If there is something the administration can bring forth with the administration imprimatur on it which will do the job, fine. We will rejoice. It is the job we want to get done.

Tomorrow, I believe it is, the President is going to meet with the steel companies, just an example of the national stake in this whole problem. In Germany the steel companies are being granted what is in effect—or at least as I understand it—an exception from the antimonopoly laws. They are being allowed to do certain things, or at least it is proposed that they be allowed to do certain things which they have not been doing.

This is another example of how the antitrust laws will affect international trade because they presume they will be in a more productive and therefore more competitive mode if they do business in this new and different manner. I am not suggesting that the Presi-

dent should make similar proposals to our steel companies tomorrow but I am just pointing out that it is another example of how all of this is intertwined at the very pinnacle of our national interest.

I do not know whether any of you would like to comment on the steel question and what may emerge.

Mr. UNGER. Well, clearly the steel issues are in the Department of Commerce, and the meeting with the President is designed to review our trigger price mechanism and the effect that a great number of private suits might have on the TPM and on the lawyers that would have to participate in the case from the Department of Commerce, and whether or not we could still maintain it.

That has an effect on our trading partners, and that has an effect on economies beyond our borders. We really do have a series of interlocking extraterritorial legal issues that need to be addressed. I am not married to any single solution but I am married to trying to solve them by whatever means is appropriate. I hope that we can, as an administration or in conjunction with the Congress, work together. If it is possible to work with the House and the Senate to resolve a unified national position, I think it is helpful. It meets some of the problems, when and if we come back with any sort of understanding.

Senator MATHIAS. Gentlemen, thank you very much. We urge you to go forth and reason together. We will be glad to hear any product of your reasoning.

[Prepared statements follow:]

STATEMENT OF SHERMAN E. UNGER

GENERAL COUNSEL

U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and members of the Committee:

I am pleased to appear before you today to present the views of the Department of Commerce on S. 432, which would establish a Commission to study the international application of the United States antitrust laws.

Because of budgetary constraints, we cannot at this time express support for the formal creation of this proposed new government entity. Our support for the need for coordinated study of the issues, however, remains unqualified.

The type of study envisioned would be extremely helpful to efforts the Department of Commerce is making to increase American exports. It can also improve our relations with our principal trading partners. Foreign governments often object to the extra-territorial effect of many of our laws which make economic actions taken by an American company within the borders of that foreign country a violation of American law though such actions are legal, and often encouraged, by the foreign country.

While the study as currently conceived would deal only with the antitrust laws, it is generally agreed that the work must be expanded to deal with the extraterritorial effect of all our laws. Our major trade partners and American business face difficult legal and economic problems because of the extraterritorial effect of U.S. laws such as the Foreign

Corrupt Practices Act, and the Export Administration Act's general export control provisions and antiboycott regulations.

The Department of Commerce and this Administration continue to believe that export trading company legislation -- such as that contained in S. 734, which was unanimously passed by the Senate on April 8, 1981 -- can help remove much of the uncertainty that the business community has felt about the application of U.S. antitrust laws to export activities. It will provide a new and specific certification process to give exporters advance knowledge of the acceptability of proposed conduct. It will clarify the permissible bounds of joint efforts by U.S. companies in promoting exports. Its provision of greater clarity will be direct and immediate. As a result, we see no need for further extended study of export promotion provisions such as those contained in S. 734.

We do recognize, however, that significant unresolved issues in the application of our antitrust laws would remain even after passage of export trading company legislation. American businesses will continue to participate in commercial arrangements overseas that do not fit into the mold of export trading companies, but that do have U.S. antitrust ramifications stemming from involvement in such activities as distribution and licensing arrangements, mergers, acquisitions, and joint ventures.

For example, American companies wanting to export to foreign countries are sometimes required by that country's government to be a non-controlling partner in a joint venture with a native company. These foreign governments sometimes insist, as a further condition to any trade rights, that the American

corporation distribute the goods of the joint venture in the U.S. market in a prescribed manner. Many American companies forego such trade opportunities because the required distribution of imported goods may bring them into conflict with the antitrust laws. Study of this and similar issues could expand our future trade by clarifying corporate liability under our own antitrust laws for these emerging distribution arrangements. Consideration must be given both to the conflicts which these laws create with countries who deny our jurisdiction to regulate economic activity that takes place within their jurisdiction and to the competitive disadvantages that are suffered by American businesses.

I want to emphasize however that we at the Department of Commerce do not believe that the harmful impact on international commerce and trade of the transnational application of laws stems exclusively, or even largely, from the application of antitrust laws to international transactions. The relationship of U.S. antitrust laws to international transactions is but one small part of the broader problem -- the transnational application of the laws of one sovereign jurisdiction to conduct which takes place within the borders of another sovereign jurisdiction. The Export Administration Act's general export control provisions, the antiboycott laws, and the Foreign Corrupt Practices Act all pose serious and immediate problems for U.S. business and our trading partners. I am, therefore, in complete agreement with my good friend, Bill Baxter, whose statement to this Committee warrants repeating here.

> "A study aimed only at the extraterritorial aspects of one Federal law, when the basic problem is not so confined,

will suffer from too narrow a perspective and might miss the opportunity for full consideration of international allocation of legislative jurisdiction as a public policy issue. It will do us little good to go to the expense and trouble of studying only antitrust issues now if we would only have to start over again later and study the international aspects of other Federal statutes. Thus, we would prefer to see consideration of all the basic questions that arise when national jurisdiction is asserted over transnational conduct -- questions that are directly implicated by a wide variety of United States laws."

Nor should our concern be limited to instances involving the application of our laws to economic activity engaged in by American firms in foreign jurisdictions. Equal attention should be devoted to the increasingly frequent impact of foreign countries' laws on American business.

The increasingly effective ability of other nations, and especially of our major trading partners, to compete in international markets is being accompanied by equally vigorous attempts to apply their laws to business ventures and transactions involving American interests. Let me give you two examples that come readily to mind.

- The British Monopolies and Mergers Commission in September of 1981 opposed the acquisition of a native engineering and construction firm (Davy Corporation Limited) by an American company (ENSERCH Corporation). They did so primarily because of British concern that the reach of our Foreign Corrupt Practices Act would put the resulting entity at a

competitive disadvantage in seeking contracts in Third World countries whose customs and laws might accept conduct which would be prosecuted under the U.S. law.

- Recently, the well established Pulp, Paper, and Paperboard Export Association of the U.S. has sought U.S. government intercession in a suit brought by the Commission of the European Communities. The Association's primary concern is that the EC Commission has turned to a lawsuit against one Webb-Pomerene Association as a means of establishing rules concerning the legality of such associations under the Treaty of Rome. The Association urges that the issue be treated instead as a subject for diplomatic consultation.

I am convinced that such activities of our principal trading partners is a natural reflection of their increasing economic power and success in competing in international markets.

I am equally convinced that it argues persuasively for beginning now to lay the foundations for relevant studies so that our Nation can develop the most effective recommendations for necessary responses, including legislative initiatives, for equitable resolution of issues involving transnational application of laws in the decade of the 80's - to and from the U.S.

Finally, consistent with our recommendation to expand the number of Federal statutes whose extraterritorial aspects be studied, we recommend including the Department of Commerce as an active participant in any such study. The Department's inclusion is appropriate because of our particular responsibility in the international trade area as well as our experience with transnational application issues in the export administration and antiboycott areas.

Thank you for this opportunity to express my views on these important issues. I would be happy to answer any questions you may have.

STATEMENT OF

WILLIAM F. BAXTER
Assistant Attorney General
Antitrust Division

Mr. Chairman and Members of the Committee:

I am pleased to appear today to present the views of the Department of Justice on S. 432, which would establish a commission to study the international application of antitrust laws. As you know, this issue has generated wide interest and discussion. Some members of Congress and some in the private sector perceive some aspects of the antitrust laws as having a chilling effect on U.S. export trade. In addition, the concern in several foreign capitals over what is perceived to be overly aggressive transnational application of United States antitrust laws has resulted in the passage of a number of so-called blocking statutes.

We believe that our basic assertion of antitrust jurisdiction over restrictive business practices that produce direct and substantial adverse effects on our economy is fully consistent with principles of international law. This position was adopted by the International Law Association at its 55th conference in August 1972, and was affirmed by Attorney General Smith in a recent address. The Attorney General noted that the true conflict in situations of this type is over which nation's law and policy is to prevail in the particular circumstances. Our view is that, because of the basic nature of the problem, conflict-of-laws analysis and principles of comity should be brought to bear in cases where jurisdiction is claimed over acts occurring abroad.

S. 432 proposes a commission to study aspects of antitrust law exclusively. Since antitrust is only one of several statutory schemes whose international application has raised questions, the Department of Justice believes that a commission study focusing exclusively on the international aspects of

the United States antitrust laws would not return benefits sufficient to justify the costs that would be incurred.

The antitrust laws, correctly interpreted, are generally acknowledged not to impose a significant impediment to United States business in its efforts to compete abroad. The Antitrust Division has made vigorous efforts, through various speeches and publications, */ to apprise the business community of that fact. The assertion that businesses are deterred from undertaking overseas ventures by their fear of antitrust consequences is further addressed by export trading company legislation introduced in this Congress which the Administration supports. The fact is that controversies with our trading partners and allies that have been said to stem from the extension of U.S. law into the sphere of international commerce and trade do not derive exclusively or even primarily from the application of the antitrust laws to international transactions. Other United States laws have been identified as posing serious or immediate problems for United States business and also for our trading partners. A representative sampling of these laws, which are the subject of ongoing evaluation within the Administration, would include the Export Administration Act's general export control provisions and anti-boycott regulations, the Ribicoff Tax Amendments of 1976, the Trading with the Enemy Act, CFTC regulation and enforcement actions in relation to foreign brokers, and the Foreign Corrupt Practices Act.

It is not obvious that a commission of the type proposed by S. 432 would be able to resolve some of the international differences regarding the exercise of antitrust jurisdiction. Moreover, we believe that the commission's mandate would be too narrow. If the reach of United States law over transnational business practices is a matter of concern sufficient to justify further study, it is a broad concern: as I have already mentioned, a wide range of United States law is involved.

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*/ E.g., Antitrust Guide for International Operations, Department of Justice, Antitrust Division (1977); Antitrust Guide Concerning Research Joint Ventures, Department of Justice, Antitrust Division (1980).

Because the controversy over so-called "extraterritorial" application really represents an international dispute over scopes of legislative jurisdiction of the various trading nations, it can be resolved, ultimately, only by international agreement of some type. Accordingly, we at the Justice Department have been exploring the possibility of informal bilateral discussions with some of our trading partners regarding spheres of legislative control of restrictive business practices. I believe that some of the basic jurisdictional issues have to be addressed in the context of such discussions rather than in the context of a commission study. The insight gained in the course of bilateral discussions would, I believe, be of great value to the work of any commission that may be established in the future.

This will be a difficult venture: it will be time-consuming for all involved, and there can be no assurance that successful harmonization of the policies underlying the several laws I have mentioned with the interests of our trading partners can be achieved. Nevertheless, the problem is serious and we agree that an effort should be made. I can only reiterate that the Department of Justice believes that a study aimed only at the extraterritorial aspects of one federal law, when the basic problem is not so confined, will suffer from too narrow a perspective and might miss the opportunity for full consideration of international allocation of legislative jurisdiction as a public policy issue. It will do us little good to go to the expense and trouble of studying only antitrust issues now if we would only have to start over again later and study the international aspects of other federal statutes. Thus, we would prefer to see consideration of all the basic questions that arise when national jurisdiction is asserted over transnational conduct -- questions that are directly implicated by a wide variety of United States laws.

This concludes my statement. I would be happy to answer any questions that you may have.

STATEMENT OF
DAVIS R. ROBINSON
THE LEGAL ADVISER
DEPARTMENT OF STATE

Mr. Chairman, thank you for the opportunity to appear before you to present the views of the Department of State on S. 432.

This bill addresses a problem that has occupied me a great deal during my initial months as Legal Adviser -- the increasing scope and complexity of conflicts between exercises of U.S. economic regulatory jurisdiction, including administration of the antitrust laws, and the laws and interests of foreign nations. These conflicts arise in many different contexts, and they appear to be increasingly costly to U.S. interests. On the one hand they can create friction in our relations with other nations while, on the other hand, they can limit the ability of the United States to carry forward important programs of regulation and law enforcement in the national interest. Furthermore, conflicts over jurisdiction are seen by some as detrimental to U.S. trade and commercial interests.

In my statement today, I would like to summarize some of the jurisdictional conflicts that have come to our attention recently; explain the measures the United States Government is currently taking to prevent or better manage such conflicts; and discuss further measures for improvement such as that proposed in S. 432.

The Nature of the Problem - S. 432 addresses conflicts of jurisdiction in the area of antitrust. While antitrust issues in this context are longstanding and familiar, I should say at the outset that I believe that conflicts in other areas are equally significant to U.S. interests and require an equal measure of consideration.

Antitrust - With regard to antitrust, this Committee is aware of the steps taken by the Antitrust Division and the Federal Trade Commission to avoid unnecessary conflicts with foreign governments. The U.S. played a leading role in the establishment by the Organization for Economic Cooperation and Development of arrangements for prior notice and consultation in antitrust enforcement involving foreign government interests. Moreover, U.S. enforcement agencies have entered into detailed cooperative arrangements with some foreign antitrust agencies. U.S. enforcement agencies have also generally refrained from the use of compulsory means to obtain information located abroad, in recognition of the sensitivity of foreign governments and the practical difficulties of enforcement in the absence of international agreement.

Overall, such measures have been helpful in avoiding or at least better managing conflicts with foreign jurisdictions in antitrust cases brought by the United States Government.

A greater problem, however, persists in the area of private treble damage actions. In such cases, private parties may find it necessary or advantageous to implicate foreign governmental interests without regard to considerations of comity which are often taken into account by U.S. Government agencies in initiating or conducting litigation. Thus, in private treble damage cases, prior notice and consultation among governments are not very effective. Presently, we can look to the courts for further development of principles which define the appropriate scope of jurisdiction by U.S. courts where foreign governmental interests are involved. But while cases such as Timberlane and Mannington Mills represent a start, our law in this area is still relatively undeveloped. In my

view, much remains to be done to articulate appropriate standards to guide the exercise of antitrust jurisdiction in this area.

Even in the area of public antitrust enforcement, some conflicts are presently unavoidable because of serious underlying differences with foreign governments about the appropriate extent of U.S. jurisdiction. In some areas, such as international shipping, competing national policies and claims to jurisdiction are clear and contentious. Assistant Attorney General Baxter has stated that discussion and agreement with foreign antitrust authorities regarding the proper extent of each party's antitrust jurisdiction is the best and perhaps the only way to avoid conflict. The process of defining national spheres of antitrust enforcement jurisdiction will be difficult, but we applaud Mr. Baxter's determination to embark upon this process.

Other Conflicts of Jurisdiction - In areas other than antitrust, we face a variety of important jurisdictional conflicts with foreign governments. Many governments, including some of our closest allies, view U.S. regulation of persons or conduct within their territory as affronts to their jurisdiction and to their national interest. They have questioned the doctrinal basis of U.S. laws and regulations which appear to them to have evolved without clear Congressional direction as well as without administrative consistency.

Le me give you some illustrations of the varied types of cases that have arisen in the past year or two.

-- The United Kingdom has taken vigorous exception to the application of U.S. foreign asset control regulations and U.S. antiboycott legislation to U.K. subsidiaries of U.S. parent corporations. The United Kingdom similarly protested the application of U.S. export control re-transfer requirements to U.K.

firms. The British have also objected to the scope of our commodities regulations.

-- The Canadian Government protested U.S. regulation of rail and container carriage in or through Canada.

-- Several governments expressed disquiet over the application of U.S. blocking measures directed at Iranian property within their territory and have taken exception to enforcement of our securities laws in certain international transactions.

-- The Swiss Government has expressed concern over foreign investigative activities within Swiss territory that violate Swiss law. We have just had a case where private U.S. counsel were detained and their documents seized in Switzerland because they conducted a deposition there without authorization, contrary to Swiss law.

-- Finally, demands for information by a U.S. regulatory agency prompted the U.K. to invoke its Protection of Trading Interests Act for the first time to block compliance with the agency's order.

These conflicts in non-antitrust situations vary in their facts and in the legal interests and policies of the United States Government and the foreign governments involved. However, all of these disputes have common consequences:

-- They have a cost for U.S. foreign relations. They may deplete the goodwill of a foreign government as well as its willingness to cooperate with us on other projects of importance. Indeed, such disputes have prompted friendly foreign governments -- the U.K., Canada, Australia, Belgium, France, New Zealand -- to adopt or implement blocking statutes aimed at curbing perceived excesses of U.S. regulatory zeal.

-- Such conflicts have other costs for us. They require the time and effort of specialized attorneys and diplomats

to sort out the pieces when conflicts occur. In the meantime, the U.S. regulatory interests that prompted our action may be thwarted.

What We Are Doing - On the antitrust side, I have already described the measures used by the U.S. enforcement agencies to prevent or contain conflicts of jurisdiction. In the case of private treble damage suits, I have noted that these measures are not particularly effective, with the result that we currently must rely on the continued development and refinement of suitable jurisdictional doctrines by the courts.

On the non-antitrust side, we also believe that there are steps which U.S. agencies can take to head off jurisdictional conflicts. We are encouraging the widespread adoption and practice of prior notice and consultation, both with the State Department and with foreign governments, in connection with regulatory or enforcement actions by United States agencies which affect foreign interests. We think that once instituted, these practices can over time help to avoid unnecessary conflicts. Furthermore, in the development of internal U.S. Government policy, the State Department is trying to ensure that the political and economic costs of regulating foreign parties and interests are fully appreciated.

Such measures can help, but they cannot prevent conflicts of jurisdiction. There are times when Congress or executive agencies find it necessary to regulate conduct abroad subject to U.S. jurisdiction in order to satisfy significant national needs and policies. Moreover, because of the variety of laws, agencies and regulatory programs involved, it is difficult to articulate and implement a

consistent government-wide approach to avoidance or better management of conflicts of jurisdiction.

What to Do -

We will continue the measures I have described to seek to prevent conflicts of jurisdiction. However, because these measures tend to be both piecemeal and reactive, I am persuaded that this Administration needs to undertake a systematic assessment of the range of problems and interests involved in conflicts of jurisdiction. We should answer questions such as:

-- What are the proper limits to our jurisdiction;

-- What should be regulated by U.S. agencies or litigated in U.S. courts rather than resolved through diplomacy;

-- How can we prevent or manage conflicts of jurisdiction; and

-- What are the consequences of our present approaches to jurisdiction in terms of the effectiveness of our enforcement, the costs to foreign relations, and the implications for U.S. business abroad.

A review of this kind would dramatize and confirm to foreign governments and to concerned private observers our determination to avoid or better manage conflicts of international economic regulatory jurisdiction. Such a study could also help to educate concerned U.S. agencies and authorities as to the problems involved in cases of jurisdictional conflicts and the alternatives available for addressing these problems. Finally, I believe that such a study could give us a clearer and more rational body of principles to guide U.S. agencies in actions that affect foreign interests.

The Presidential study commission proposed in S. 432 is one way to pursue these objectives. However, I cannot say today that the Department of State is convinced that a

commission is the best way to proceed. The Committee should understand the Administration's determination to avoid unnecessary expenditures and to limit the proliferation of new entities of government. We do believe, however, that the question of conflicts of jurisdiction in international transactions in our increasingly interdependent world requires prompt attention. We are looking into all of the available alternative means to determine how to do this most effectively. The Department of State and the Administration are determined to develop a more coherent and appropriate approach to the complex problem of conflicts of international economic regulatory jurisdiction.

Senator MATHIAS. Our next panel will be Kingman Brewster and Lloyd Cutler. The committee is pleased to welcome two such distinguished witnesses. Mr. Cutler, I do not suppose we can say that you have sat at the right hand of God but you have done the nearest equivalent which is available on this Earth. Mr. Brewster has been fortunate in holding 2 of the 10 best jobs available in the Western World, so you come to us with remarkable experience, and we appreciate it.

Which of you would like to proceed? We will proceed alphabetically, then.

STATEMENT OF KINGMAN BREWSTER, ESQ., WINTHROP, STIMSON, PUTNAM & ROBERTS, NEW YORK, N.Y.

Mr. BREWSTER. Mr. Chairman, I am Kingman Brewster, currently of counsel to the law firm of Winthrop, Stimson, Putnam & Roberts of New York City. My residence is 38 Lincoln Street, New Haven, Conn. I am the coauthor of Atwood and Brewster, "Antitrust and American Business Abroad," which is published by McGraw-Hill. It is the second edition of a book I wrote originally in 1958.

From 1950 to 1960 I was a professor of law at Harvard Law School. From 1960 through 1977 I was a professor of law at the Yale Law School but was somewhat preoccupied with the duties first as provost from 1960 to 1963, and then as president of Yale from 1963 to 1977.

Senator MATHIAS. An ideal time to be president of a college.

Mr. BREWSTER. It was very challenging, shall we say.

I became the U.S. Ambassador to the United Kingdom of Great Britain and Northern Ireland in 1977 and resigned that post, most reluctantly, in February of 1981.

I am greatly honored to be asked by you, Mr. Chairman, to testify on S. 432, which would establish an International Antitrust Commission. I favor the creation of such a Commission. However, I

doubt that you should expect to seek legislative modification of the jurisdictional or substantive standards which govern the application of the antitrust laws to foreign commerce, with one exception to which I shall shortly return.

However, even if the Commission were not to seek legislative modification, there are sufficient points of doubt and friction in the application of our law to foreign parties and transactions so that the Congress does deserve to be brought up to date by an authoritative review of the state of the law and practice and its consequences for business and public policy.

The one point to which I would direct a study commission's attention for possible legislative reform is in the area of private treble damage suits arising from international transactions. The ease with which private plaintiffs can threaten foreign companies, not only with the heavy costs of litigation but the possibility of three times the recovery of actual damages, outrages even those of our foreign friends and allies who understand us best.

Thus, Great Britain has passed the so-called clawback statute which authorizes suit in a British court for two-thirds of the damages recovered against a British corporation in an American antitrust action not exclusively territorial. Similar legislation applicable to all damages is pending in Australia.

The objection of foreign nations is not just to the financial shadow cast by such suits; it is the shock and outrage with which other countries view giving unleashed prosecutorial discretion to private plaintiffs in international suits. At least the Government can take into account the broader elements of national interest, comity, and foreign political economic policy when it decides whether or not to prosecute or what remedy to seek.

The private plaintiff is under no such inhibition or constraint. Indeed, the diplomatic note passed to the British Government referred to such private plaintiffs as "private attorneys general." This reference was picked up and made the most of in the presentation of the "clawback" legislation by the Secretary of State for Trade in the House of Commons.

There are, of course, great difficulties in drafting a legislative modification which would afford foreign defendants an immunity not enjoyed by their American conferees. However, the problem does deserve thoughtful study and exercise of drafting skill and procedural ingenuity.

On the scope of the Commission's mandate, with great respect I beg to differ with the views expressed here this morning by the Assistant Attorney General in charge of the Antitrust Division, Professor William Baxter, and by the Legal Advisor to the Department of State, Mr. Davis Robinson. While I agree that antitrust is not the only law whose application to foreign parties and foreign conduct offends other nations, I myself seriously doubt the usefulness of bundling together the study of laws which reflect quite disparate national interests and policies.

The priority which our national interest urges will differ in each instance. The conflicting interests of other States which must be dealt with will also be quite different in the case of export control or antiboycott legislation than they will be in antitrust. I think it is illusory to hope that a single jurisdictional rule can be found which

will cover all. Therefore, Mr. Chairman, I strenuously urge that the study commission be limited to one policy area and its members chosen accordingly. The potential contribution of both public and private individuals will vary enormously from substantive field to substantive field.

I think, Mr. Chairman, this exhausts my potential contribution to your deliberations about an international antitrust study commission but I would be glad to answer any questions which any member of the committee or staff might have, either now or in person or in writing at a later time.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Brewster.

I am glad you made the point that it may not be necessary to seek legislative modification of the law as a result of this Commission because that is my point of view at the moment. I am not pursuing the idea of a Commission with any drive or ambition to change the law. I think we ought to know exactly how the law operates today, in the late 20th century economic international climate. Then we can make a decision as to whether or not modifications are necessary either in the statute or in the administration of the law.

Mr. Cutler?

STATEMENT OF LLOYD CUTLER, ESQ., WILMER, CUTLER & PICKERING, WASHINGTON, D.C.

Mr. CUTLER. Mr. Chairman, I agree with your appraisal of Ambassador Brewster's two jobs, and I would much rather have had either of those than what you referred to as "the right hand of God." I notice you did not put that one in the first 10.

Senator MATHIAS. He appears here, however, in a very informal costume as compared to his normal working suit when he was on the job in other incarnations.

Mr. CUTLER. It is still the morning. He has on only one colored shirt at the moment. [Laughter.]

I also strongly support your proposed commission, Senator Mathias. I will not repeat the broad arguments that others have advanced. I would strongly endorse the point you made to Mr. Baxter of the need for congressional participation in this process.

It is certainly true that the head of the Government of the United States, as our allies and trading partners have painfully learned, cannot commit the Government he heads. The British tax treaty is a very good example of that, and other countries have learned that in negotiating with the United States it is necessary to keep something in reserve for the second round of trading with Congress; that is just part of our system and we have to live with it.

However, it is tremendously important, I think, as we engage in negotiation with other countries which is the only practical solution of these problems, that Congress, position is well known and our trading partners can rely to a considerable degree on the fact that any commitments they make with the American negotiators are going to be supported by the Congress.

Second is the practical value of a major congressional commission in concentrating the minds of the executive branch and all the

rest of us on a problem like this. I dare say the three gentlemen who just testified before you rarely meet to deliberate over this problem except in the course of solving some particular emergency that very day.

I have three main points to make, Mr. Chairman. The first seconds what Ambassador Brewster had to say about the private triple damage action. It is true under our law, whether or not the Department has charged a foreign firm with an antitrust violation, that an American lawyer can file a class suit on behalf of a class including foreign firms, plaintiff foreign firms, against other defendant foreign firms, and collect triple damages or a large settlement because of the threat of triple damages, for conduct involving our trade with foreign nations that is perfectly lawful under the laws of the country where both these involuntary foreign plaintiffs and the foreign defendants reside. It is not only possible, it has actually happened. I cannot imagine any type of extraterritorial reach that other nations would regard as more outrageous. That is why the British Government has referred to the triple damage action as the "rogue elephant" of American law.

My second point is that overdoing the extraterritorial reach of national law is a two-edged sword. For this reason, I would suggest that the Commission to be created should not only consider the impact of our own antitrust laws on worldwide economic activity—which is the way I now read your bill—but the impact of other nations' competition laws as well. Ours is not the only legal system that applies the effects test to determine antitrust jurisdiction, subject of course to the balancing of conflicting national interests as a matter of comity under international law.

The European Common Market and West Germany also apply the effects test, and to the extent they balance at all, they do so only according to their own view of conflicting national interests. While we tend to think that our antitrust laws bite more sharply than the antitrust laws of other countries, this is not always the case.

The German antitrust laws are much tougher than ours; they apply rigid numerical tests. The European Community applies theories of protecting competitors rather than preserving competition, that our courts and our antitrust officials reject. In one major proceeding now pending, the Community is charging a major American high-technology firm with abusing an alleged dominant position by making worldwide design innovations and withholding advance information about new designs from its American and Japanese competitors, a theory which—on the identical facts involving some of those same American competitors as parties—our own courts have expressly rejected.

If the Community obtains the relief it has asked, the effects will be profound in the United States as well as in Europe even though our own courts have ruled that the challenged conduct is not only lawful but procompetitive. In the opinion of my colleague, Professor Donald Turner, this proceeding—apart from its substantive antitrust theories which are very debatable—could have an extraterritorial reach that goes far beyond any case our own antitrust authorities have ever brought against a foreign firm.

My third point is that we are not going to solve the problem of extraterritorial reach by ourselves. We now live in an interdependent world in which economic activity knows few boundaries and the regulatory laws of one country affect the economy and the interests of many countries. More than one country normally will have a reasonable basis for exercising jurisdiction. Even if we show consideration for the interests of other nations—for example, by a statute barring triple damages against foreign defendants whom our own Government has not charged with a violation—we still must persuade other nations to consider our interests.

We must simply work out cooperative solutions with other nations, as has been suggested. I think such solutions require two elements: One is really to build on the existing machinery of the OECD or make bilateral agreements with our trading partners so as to formulate agreed international standards for the application of national competition laws, tax laws, and trade control laws to the citizens and enterprises of other countries. We might take as a model those set forth in the American Law Institute's restatement of the foreign relations law of the United States, which are based on international law and have been cited with approval by the governments and the scholars of other nations.

The second element is the creation of an international tribunal to adjudicate governmental and private claims that these agreed standards have been violated. That is the direction, Mr. Chairman, in which I believe the Commission should look.

Senator MATHIAS. Thank you very much, Mr. Cutler.

I would agree with your observation that we have to look at how foreign antitrust laws are interacting with our own. I do not really think the Commission could have a comprehensive result if it did not view the whole climate within which business was trying to operate, and that would include the operation of foreign antitrust laws and how they might be in fact compounding the effect on American business in some cases when they operated to supplement our own.

I think also it is fair to say that we are interested in competitiveness, and that it might turn out that some foreign businesses are being unfairly restricted in their ability to compete within the United States, in gaining an opportunity to import and to gain a market within the United States. This is not all a matter of protection of U.S. exporters. It may have some spinoff value to foreign importers into the United States, so it can be an evenhanded approach.

However, both of you are very knowledgeable about the European scene. How do you think the members of the European Economy Community would react to this study of the international application of the antitrust laws?

Mr. CUTLER. Ambassador Brewster and I were discussing that very point a few moments ago. I have not put it to anyone but it is my hunch that all of them would welcome the existence of the Commission as a way to focus attention on this problem in the United States and as a necessary prelude to working out appropriate multinational or bilateral agreements. However, Mr. Brewster has been there even more recently than I have on this subject, and he can tell you what he thinks.

Mr. BREWSTER. Well, on the basis of purely personal and informal conversations, it is my personal impression that they would welcome it. I have no idea, of course, what the official position of the British Government would be but I have had a chance to converse informally with those who have been actively interested, and I think they would welcome this, both in the private sector and in the Government.

Senator MATHIAS. Well, I am somewhat surprised and pleased that both of you have that view because the general reaction that we get here in the Senate from foreign representatives is that they wish the whole issue of U.S. antitrust laws could somehow or other just go away, and that they would not have to be bothered with it.

However, do you feel that, as I have suggested, that there may even be some advantage to foreign companies wanting to do business in the United States, in that their competitiveness might be enhanced or at least preserved?

Mr. CUTLER. I think there is no question about that, Senator Mathias. If we think of what has always been called the multinational firm, the firm doing a worldwide business under many jurisdictions, many of those firms are American, of course, but an equal number have their headquarters in other countries, roughly half of the major multinationals.

All of them are deeply troubled by the conflict and the overlap of competition laws and other types of trade regulation laws, and I would think a number of the foreign multinational chief executives would happily come and testify before your committee and support what you are doing.

Mr. BREWSTER. I would supplement that, Senator, simply by saying that as far as foreigners wanting to invest, or license, or engage in joint ventures in this country, one of the big clouds which stands over those decisions is the big question mark as to how far thereby they will be subjecting themselves to American antitrust scrutiny, not of their operations within this country but of their operations at home or within third countries. I think that is not a real threat but it is a psychological threat until it is clarified.

TREBLE-DAMAGE FACTOR

Senator MATHIAS. Both of you have mentioned the treble-damage factor. Would you think it would be appropriate to consider mechanisms by which the U.S. Government might participate in this kind of litigation so that antitrust activity and foreign relations policy can be coordinated when these matters are brought before the courts, when they have some pertinence to a private lawsuit?

Mr. CUTLER. I certainly would, Senator Mathias. I have toyed from time to time with a draft statute. I think any of these would take statutes, other than the United States appearing as amicus in the case. I thought it might be possible to have a statute in which, at least in suits against foreign defendants, the Attorney General would be free to come in on behalf of the U.S. Government, after proper coordination within the executive branch, to request of the court that the suit be dismissed for foreign policy or conflict of law reasons; and that if the Attorney General so requested, the judge would be required to dismiss the private treble-damage action.

Senator MATHIAS. Would you concur?

Mr. BREWSTER. I agree that some legislative modification would be necessary to deal with this. I think Assistant Attorney General Baxter has already indicated as a general matter that he would feel free, if he thought the public interest was adversely affected in his absence, to intervene as an amicus in a private suit, not thinking just about foreign commerce.

However, I do not think that is enough. I think in the case of foreign commerce there has to be some way in which a foreign government can approach our Government and raise its objections, and know that that will have an effect on the conduct of the litigation. I think that some such legislative modification as Lloyd Cutler suggests, or perhaps a more substantive declaration of a different standard of jurisdiction for foreign parties in private suits than in public suits, would be desirable.

Senator MATHIAS. Gentlemen, I thank you both very much for being here and your very valuable addition to our record.

[The prepared statements follow:]

Statement by Kingman Brewster,
before the Senate Committee on
the Judiciary on S.432
December 3, 1981

Gentlemen of the Committee.

I am Kingman Brewster, currently of counsel to the law firm of Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York City. My residence is 38 Lincoln Street, New Haven, Connecticut 06511.

I am the co-author of Atwood and Brewster, Antitrust and American Business Abroad (McGraw-Hill 1981), the second edition of a book I wrote originally in 1958. From 1950 to 1960 I was a Professor of Law at Harvard Law School. From 1960 through 1977 I was a Professor of Law at the Yale Law School but was preoccupied with the duties first as Provost, from 1960 to 1963, and then President from 1963 to 1977. I became the United States Ambassador to the United Kingdom of Great Britain and Northern Ireland in 1977 and resigned that post in February of 1981.

I am greatly honored to be asked by your Chairman and Senator Mathias to testify on Senate 432 which would establish an International Antitrust Study Commission.

I favor the creation of such a commission. However, I doubt that you should expect to seek legislative modification of the jurisdictional or substantive standards which govern the application of the antitrust laws to foreign commerce, with one exception to which I shall shortly return. Even if the Commission were not to seek legislative modification, however, there are sufficient points of doubt and friction in the application of our law to foreign parties and transactions so that the Congress deserves to be brought up to date by an authoritative review of the state of law and practice and its consequences for business and public policy.

The one point to which I would direct a Study Commission's attention for possible legislative reform is in the area of private treble damage suits arising from international transactions. The ease with which private plaintiffs can threaten foreign companies not only with the heavy costs of litigation but the possibility of three times the recovery of actual damages outrages even those of our foreign friends and allies who understand us best. Thus, Great Britain has passed a so-called "claw back" statute which authorizes suit in a British court for two thirds of the damages recovered against a British corporation in an antitrust action not

"exclusively territorial". Similar legislation applicable to all damages is pending in Australia. The objection of foreign nations is not just to the financial shadow cast by such suits, it is the shock and outrage with which other countries view giving unleashed prosecutorial discretion to private plaintiffs in international suits. At least the government can take into account the broader elements of national interest, comity, and foreign political economic policy when it decides whether or not to prosecute or what remedy to seek. The private plaintiff is under no such inhibition or constraint. Indeed the diplomatic note passed to the British Government referred to such private plaintiffs as "private attorney's general". This reference was picked up and made the most of in the presentation of the "claw back" legislation by the Secretary of State for Trade in the House of Commons.

There are, of course, great difficulties in drafting a legislative modification which would afford foreign defendants an immunity not enjoyed by their American conferrees. However, the problem deserves thoughtful study and exercise of drafting skill and procedural ingenuity.

On the scope of the Commission's mandate, with great respect I beg to differ with the views expressed before the House Committee by the Assistant Attorney in charge of the Antitrust Division, Professor William Baxter. While I agree that antitrust is not the only law whose application to foreign parties and foreign conduct offends other nations, I seriously doubt the usefulness of bundling together the study of laws which reflect quite disparate national interests and policies. The priority which our national interest urges will differ in each instance. The conflicting interests of other states which must be dealt with will also be quite different in the case of export control, or anti-boycott legislation than they will be in antitrust. I think that it is illusory to hope that a single jurisdictional "rule" can be found which will cover all. Therefore, Mr. Chairman, I strenuously urge that the Study Commission be limited to one policy area and its members chosen accordingly. The Potential contribution of both public and private individuals will vary from substantive field to substantive field.

I think this exhausts my potential contribution to your deliberations about an International Antitrust Study Commission, but I would be glad to answer any questions which any member of the Committee or staff might have, either now or in person or in writing at a later time.

Thank you, Mr. Chairman.

STATEMENT OF LLOYD N. CUTLER

Mr. Chairman and Members of the Committee:

My name is Lloyd Cutler. I have spent a large part of my law practice in the fields of international investment and antitrust counseling and litigation. During my brief time in Government, and especially in connection with the hostage crisis, I had direct experience with the legal and diplomatic problems arising out of the extra-territorial reach of our laws and those of other nations. I have written about these issues and some possible solutions in a booklet published by the Foreign Policy Association entitled "Global Interdependence and the Multinational Firm," and I am submitting a copy with this statement.

I strongly support S. 432. I will not repeat the broad arguments in its favor you have heard from others. Nor will I speak in criticism of the extraterritorial reach of our own antitrust laws under the more recent enforcement policies of our Government, which in my view strike a reasonable balance between our interest in enforcing our own competition policies and the sometimes conflicting or overlapping interests of other nations. Instead, I want to make three specific points. The first two are based on my own direct experience as counsel for some of the companies involved.

The first relates to the private triple damage action. Under our law, whether or not the Department of Justice has charged a foreign firm with an antitrust violation, it is perfectly possible for an American

lawyer to file suit on behalf of a class including foreign firms against other foreign firms, and to collect triple damages or a large settlement because of the threat of triple damages, for conduct involving our trade with foreign nations that is perfectly lawful under the laws of the country where the foreign plaintiffs and defendants both reside. It is not only possible; it has actually happened. I cannot imagine any type of extraterritorial reach that other nations would regard as more outrageous. Nor can I think of any reasonable response we could make to such objections, especially in cases where our own public antitrust authorities, after balancing the U.S. interest against the competing or overlapping foreign interests, have decided not to bring suit. That is why the British Government refers to the triple damage action as the rogue elephant of American law.

My second point is that overdoing the extraterritorial reach of national law is a two-edged sword. For this reason, the Commission to be created by S. 432 should not only consider the impact of our own antitrust laws on world-wide economic activity, but the impact of other nations' competition laws as well. Ours is not the only legal system that applies the effects test to determine antitrust jurisdiction, subject of course to the balancing of conflicting national interests as a matter of comity under international law. The European Common Market and West Germany also apply the effects test, and to the extent they balance at all, they do so according to their own view of conflicting national

interests. While we tend to think that our antitrust laws bite more sharply than the competition laws of other countries, this is not always the case. The German anti-merger laws are tougher than ours, and the European Community applies theories intended to preserve competitors, rather than to preserve competition, that our courts and antitrust officials reject. In one major proceeding now pending, the Community is charging a major American high-technology firm with abusing an alleged dominant position by making worldwide design innovations and withholding advance information about new designs from its American and Japanese competitors -- a theory which, on the identical facts, our own courts have expressly rejected. If the Community obtains the relief it has asked, the effects will be profound in the United States as well as in Europe even though our courts have ruled that the challenged conduct is not only lawful but procompetitive. In the opinion of my colleague Professor Donald Turner, this proceeding could have an extraterritorial reach that goes far beyond any case our own antitrust authorities have ever brought against a foreign firm.

My third point is that we are not going to solve the problem of extraterritorial reach by ourselves. We now live in an interdependent world, in which economic activity knows few boundaries, and the regulatory laws of one country affect the economy and interests of many countries. In a large number of situations, more than one country will have a reasonable jurisdictional basis for regulating or taxing the same business and financial

activity. Even if we showed more consideration for the interests of other nations -- for example by a statute barring triple damage actions against foreign defendants whom our own Government has not charged -- we still must persuade other nations to consider our interests. We have no alternative except to work out cooperative solutions with other nations.

Such solutions require two elements. They can be achieved either by building on the existing machinery of the 23-nation OECD or by making bilateral agreements with our major trading partners. One element is to formulate agreed international standards for the application of national competition laws, tax laws and trade control laws to the citizens and enterprises of other countries. In the field of antitrust, the agreed standards could be those set forth in Sections 18 and 40 of the American Law Institute's Restatement (Second) of the Foreign Relations Law of the United States, which are based on international law and have been cited with approval by the governments and legal scholars of other nations. Since these standards are generally phrased, the Commission could usefully study how their application could be clarified by formulating more precise rules as to how the balance among various conflicting interests should be struck. The second element is the creation of an international tribunal to adjudicate governmental and private claims that these agreed standards have been violated.

Mr. Chairman, this is the direction in which

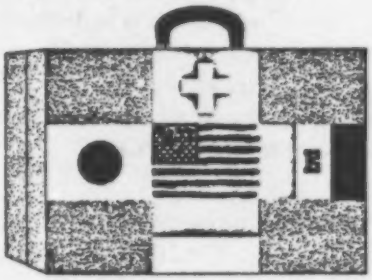
I believe the Commission should look. I do not believe that the recent introduction of bills in the House and Senate to enact a U.S. "blocking statute" is the proper solution to a complex problem in an interdependent world economy. International problems require international solutions. Since the productive period after World War II that gave us the United Nations, the World Bank, the International Monetary Fund and the General Agreement on Tariffs and Trade, we Americans have not participated in creating a single important international economic institution, even though the world becomes more economically interdependent with every passing year. Our conflicting and overlapping business regulation laws offer us an ideal place to start.

HEADLINE SERIES 239

FOREIGN POLICY ASSOCIATION

Global Interdependence and the

MULTI-NATIONAL FIRM



by
Lloyd N. Cutler

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Global Interdependence and the Multinational Firm

by Lloyd N. Cutler

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HEADLINE Series 239, April 1978 $1.40

Cover design: John Davis and Cathy Canzani

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The Foreign Policy Association

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HEADLINE Series, No. 239, April 1978, published February, April, June, October and December by the Foreign Policy Association, Inc., 345 E. 46th St., New York, N.Y. 10017. Chairman, Carter L. Burgess; Editor, Wallace Irwin, Jr.; Associate Editor, Gwen Crowe. Subscription rates, $7.00 for 5 issues; $13.00 for 10 issues; $18.00 for 15 issues. Single copies, $1.40. Second-class postage paid at New York, N.Y. **Copyright 1978 by Foreign Policy Association, Inc.** **Composed and printed at Science Press, Ephrata, Penn.**

Library of Congress Catalog No. 78-58094

1

The Multinational Firm and Its Critics

Throughout history, man has invented conspiratorial explanations of misfortunes he cannot otherwise understand. Especially in economic affairs, explanations based on conspiracy have won greater acceptance than those based on natural phenomena or human error. The Communists are "behind" organized demands for higher wages. Inflation and depression are "caused" by bankers and monopolists in order to wring even higher profits from the people.

In recent decades, governments have taken on the primary responsibility for managing their national economies—an inevitable political response to the complexity of modern economic life. Yet inflation and depression continue to occur, no doubt because of our persisting human inability to manage such a complex economic phenomenon as the business cycle. Driven by our psychological need to find a more satisfying explanation, we seek to identify the villains who deliberately bring these evils upon us. The "politicians" offer a handy and sometimes deserving target, but not an entirely satisfying one in a democracy. To attribute incompetence or villainy to the government we ourselves elect is to admit our own share of the blame. There have to be more acceptable scapegoats. Over the past decade, as

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national governments have found it harder to manage their segments of the evermore interdependent international economy, one scapegoat has been found in the multinational corporation—the firm that produces raw materials and manufactured products in more than one country, and markets them throughout the world.

The right of anyone to form a business corporation was one of the great developments of Victorian England, fully as important as the steam railroad and the Bessemer furnace. Until then, except for a brief period in the 18th century that ended in the South Sea Bubble scandal, the right of British citizens to raise money, assemble property, and carry on an enterprise in perpetual corporate form was a jealously guarded crown privilege, granted only to such favorites of the monarchy as the men who formed the East India and Hudson's Bay companies. But a new form of enterprise was needed to develop the promise of the inventions that primed the Industrial Revolution, and it was found—in Britain, the United States and other rapidly industrializing countries—in the corporation that anyone could hire a lawyer to form.

In the Victorian century (roughly 1815-1914) corporations tended to concentrate on internal development within one nation, going beyond its borders only for the raw materials they needed from other parts of the world. But as trade and business became more interdependent on a global scale, the major corporations expanded both their manufacturing and their marketing activities beyond their home markets to other industrial areas and to the less-developed markets in what we now call the "third world." They would produce wherever it was most efficient to do so, and sell wherever profits could be made. In some countries they would form branches of the parent corporation. In others they would form layers of subsidiary corporations, depending on the tax and other advantages of one form over the other. But under either format, the entire system was under the management control of the headquarters company. Most of the shareholders were usually of the headquarters nationality. In all but one of the countries in which it did business, the company

presented an essentially foreign face to its customers, suppliers and employees.

To overcome this "foreign" image, and to emphasize the growing importance of transnational business and earnings to the venture as a whole, many of these international firms began referring to themselves as "multinational companies." The name was apt for an increasingly interdependent era in which the European Economic Community (EEC, or Common Market) and a variety of other multinational politico-economic units were being formed. But for many critics, "multinational" soon became a term of public opprobrium.

Some Complaints Against Multinationals

The first influential public critique of the multinational corporation came not from the Communist or socialist left but rather from a European centrist, Jean-Jacques Servan-Schreiber, the anti-Gaullist and pro-Common Market editor of the French magazine *L'Express.* In a 1968 book called *The American Challenge,* he advanced the theory that the great American multinational firms dominated the economy of Europe; that the fate of European ministers depended on where great lords like Henry Ford II decided to start up or shut down a car factory; and that the multinational firms were insensitive to the damage their movement of funds and plants caused to the currencies and workmen left behind. He argued that until the European nations formed their own multinational firms and brought the operations of the American multinationals under national control, Europeans would not be masters of their own economic destiny.

Mr. Servan-Schreiber's case was probably overstated even for its time, and later chapters will show that the case is even weaker today. But his thesis has become widely accepted in Europe. At the same time, varying complaints against the multinationals have become increasingly audible in the third world, and in the United States as well.

Third-world criticisms derive their tone from the nationalistic spirit that followed the end of the colonial age. Multinationals

are charged with the all-purpose sin of "neocolonialism." The capital, jobs and other benefits they bring to developing economies are recognized, but the terms on which these benefits come are seen as unfair and exploitative and as robbing the new nations of their resources. Many a third-world nation also objects to the excessive intervention of multinational firms in its domestic political affairs and to the ability of these firms to shape the foreign policies of their headquarters countries toward the third world so as to serve their own business needs.

Some third-world spokesmen go further. They blame their dependence on the investment and trade of the industrialized nations for their own lack of economic and social progress. The industrialized nations, through the investment of their multinationals, are seen as advocates of the economic and social *status quo* rather than as stimulators of domestic change. These critics argue that the third-world nations must "delink" their economies and social structure from the industrialized economic community.

Some American critics agree with the third-world charge that U.S.-based multinationals influence American foreign policy in the direction of their worldwide business interests to the detriment of U.S. interests in peace, democracy and social justice. Some agree with Mr. Servan-Schreiber that U.S.-based multinational firms are insensitive to the fate of other nations' currencies or workmen. But others, most notably organized labor, present a grievance that is precisely the opposite. In their view, the American-based multinationals "export" American jobs and direct to foreign plants investments that ought to go into American plants. As a result, they are charged with making foreign firms more competitive in American and world markets, weakening our currency and adding to our unemployment rolls.

Whatever their details, these complaints against the multinational firm, at home and abroad, are variations on one essential theme: that the firm is not nationalistic enough from the viewpoint of the complaining nation. The multinational firm sins in behaving too multinationally, and doing so ahead of its

time. In an increasingly interdependent world economy, the multinational firm has evolved into an organizational form that tends to think and act on global rather than national premises as to where its interests lie. But in political structure, we are only beginning to emerge from an age of nation-states, in which each nation still believes its own political and economic interests to be different from those of the interdependent world as a whole. The interests and objectives seen by the multinational firm will rarely coincide with those seen by any one nation-state. Much as it may recognize the benefits that multinational investment provides, the nation-state still resents having to contend with the tentacles of the multinational firm while the firm's vital center remains beyond the national reach.

Location and Size

In the popular stereotype, a multinational firm is American-based and privately owned. As with all stereotypes, this description is only half true. In fact, there are only 22 American-based firms among *Fortune's* list of the 50 multinational companies with the largest industrial sales. The headquarters of the remaining 28 firms are scattered over ten other countries. Germany has seven, France five, Japan five, Britain four, the Netherlands two, and Switzerland, Italy, Iran, Brazil and Venezuela one each. (Since Shell and Unilever are British-Dutch partnerships, half of each firm is attributed to Britain and the other half to the Netherlands.) Of these 28 foreign-based firms, ten are wholly or partly owned by governments. When the data are analyzed for the largest 200 multinational firms, the same approximate proportions hold true, but the roster of headquarters nations more than doubles with the addition of Luxembourg, Spain, Belgium, Austria, Egypt, Israel, Australia and Indonesia.

The process of deconcentration is continuing, with many of the oil- and mineral-producing nations now entering the lists, usually through state-owned corporations. At the same time, the market share of any single privately owned multinational firm or group of firms in such a rapidly expanding global market is

declining. A parallel movement is taking place within single nations. While the assets and sales of the private multinational firms are very large in absolute terms, their individual or aggregate dominance in the economy of any single nation is on the decline.

One rough way of measuring this "dominance" is to compare the annual sales of multinational firms in particular areas with available data on the gross domestic product (GDP) of those areas. (Actually, such a comparison exaggerates the share of the multinationals since their sales often include value not added by them, but by others from whom they buy.) Area sales figures are difficult to come by, but a recent issue of *European Report* contains a study that compares *global* sales of multinational firms with the GDP of the 24 nations of the Organization for Economic Cooperation and Development (OECD)—the 19 largest non-Communist European economies plus the United States, Canada, Japan, Australia and New Zealand. The study concludes that in 1973 the 200 largest industrial multinationals with headquarters in one or another of the OECD nations (a classification which probably accounts for 80-90 percent of business done by the world's multinationals) had global sales equal to 32.9 percent of the GDP of all OECD nations, and that the 70 largest Common Market multinationals had global sales equal to 30.7 percent of the GDP of the Common Market nations. If these figures are adjusted to eliminate any one nation's own multinationals, an even lower percentage of each nation's GDP is attributable to "foreign-based" multinationals over which that nation lacks full national control.

Similar data are lacking for the less-developed remainder of the non-Communist world. Still, it would probably be difficult to find more than a few nations in which foreign-based multinationals account for more than 25 percent of GDP. For any single firm, or any group of firms of a single foreign nationality, the percentage would be even lower. The largest multinational is Royal Dutch Shell, with global sales exceeding $33 billion in 1976. But this figure represents only 1 percent of the GDP of the 24 OECD countries, even before deducting the significant

percentage of Shell's sales that include value added outside the OECD area.

On their face, such percentages appear to present little cause for national alarm. In an economic world as interdependent as ours, most free-world industrial nations depend on the import of goods and services for between 10 and 30 percent of their GDP and some are equally dependent on comparable percentages of foreign investment. (Even the United States is approaching 10 percent because of mounting energy imports, while Belgium and the Netherlands run well above 30 percent.) For 20-25 percent of a nation's GDP to be attributable to foreign-based companies seems entirely consistent with these other indices of interdependence, and no more incompatible with any nation's ability to "manage" its own economy than the irreversible fact of interdependence itself.

But, justified or not, the rising criticism of the multinationals cannot be ignored. It reflects two undeniable facts. First, these firms are a significant factor in the world economy. They account for perhaps $200 billion of direct productive foreign investment around the world since 1950—more than five times the aggregate loans and investments made by the World Bank and its affiliates during the same period—and they are still growing. Second, an atmosphere of mutual distrust and a sense of conflicting interests continue to characterize the relationship between multinationals and the governments with which they deal throughout the world. In the chapters that follow we examine the reasons for this distrust and conflict and what can be done about it.

2

Four Complaints Against the Multinationals: An Assessment

As noted in the first chapter, the multinationals have been criticized on a variety of grounds. In this chapter we will examine four principal criticisms: that the multinationals do not share the benefits of their operations "fairly" with the host nation; that their activities intensify the trend toward economic concentration; that they engage in improper conduct such as bribery and attempts to exert pressure on the foreign relations and domestic politics of host nations; and that their international character lessens the ability of the host nation to manage its own economy.

Whether the criticism occurs in host* countries or headquarters* countries, it is most often coupled with proposals for the host or headquarters government to exercise greater national control over the companies. The following analysis, therefore, looks at whether greater national control is an appropriate solution for the problem it is intended to cure.

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*In these pages, the term *host* refers to the country (or its government) in which operations are carried on by a company owned and controlled by a parent firm headquartered in another country. The adjective *headquarters* is used to describe the country or its government in which the parent firm and most of its shareholders are located.

1. Fair Shares for the Host Nation

The first charge against the multinational is that it does not return to its foreign host a "fair" share of the benefits of its activities in the host nation. Despite the official rhetoric of the third world, it is widely accepted that host nations benefit from technology transfer, the training and employment of local nationals, the development of local satellite industries and the opening of access to foreign markets. But there is greater and more substantial dispute over whether host nations receive a full measure of other benefits, such as tax revenues and the financial rewards and the power of control that go with equity ownership of the enterprise.

Multinational companies typically move raw, semiprocessed or finished materials from their subsidiaries or divisions in one nation to their subsidiaries or divisions in another. They record these movements as sale or "transfer" prices between their own units. Sitting on both sides of the table, they naturally have a great deal of discretion to decide what the transfer price shall be. Some firms do this as objectively as they can, without regard to tax considerations. But there are also some who exercise this discretion so as to minimize their global taxes and maximize their after-tax earnings. Since tax rates vary around the world, they accomplish this by recording profits in jurisdictions where taxes are relatively low.

The United States and many other taxing authorities try hard to block these efforts by auditing the firm's accounts and recomputing profits as if each transfer had been at arm's length between strangers. Sophisticated governments in the industrial world do a pretty good job of claiming their share of the tax pie. But the task is more difficult for raw and intermediate materials (such as iron ore, bauxite and alumina) for which readily ascertainable market prices do not exist. And the auditing task is beyond the resources of national tax systems in the developing countries where these raw and intermediate materials are largely produced.

There are also bilateral tax treaties between most industrial nations designed to assure fair transfer prices and full ex-

changes of tax information between governments. But many multinational firms still find lawful ways of beating the system. These multinationals pay a lower global income tax than the 50 percent level that is more or less the standard for domestic firms throughout the nations of the non-Communist world.

A second point relating to fair shares is the issue of equity ownership. Only shareholders of a company receive its distributed earnings. In theory at least, only they can elect the management and thereby exercise periodic control over management's business decisions. To allay any concern about absentee ownership and to broaden their access to capital markets, many of the privately owned multinationals have sought to achieve the widest possible multinational ownership of their shares by listing them on the principal stock exchanges around the globe. But the lack of a true international securities market, as well as the tax and exchange barriers that many nations erect to restrict investment in foreign shares, has made this objective very difficult to achieve. In most cases, the majority of the shares are still owned, at least nominally, by residents of the headquarters nation. From the point of view of the host nation, the foreign multinational sends its distributed earnings abroad.

The heart of the ownership issue, however, has less to do with earnings than with control. Most host governments believe that foreign owners will subordinate the interests of the host nation to their own international interests and that they will be less amenable than local owners to the host government's views. When host nations move to require majority ownership by their own nationals or by the nation itself, control is clearly the purpose.

These issues relating to a fair share for the host country have a strong emotional base, particularly in the newly formed nations where the aspirations for self-rule have not yet been diminished—as in Western Europe—by the disillusions of excessive nationalism, or by the realization of how interdependent the economies of all nations have become.

Unfortunately, we have no accepted standards for quantifying

"fair" shares for the foreign investor and for the host country. Even if both sides possessed all the data needed to assess the relative benefit contributed by each, they would undoubtedly differ on how the balance should be struck. This is not simply because businessmen and governments see matters from different occupational perspectives. The multinational and the host government also see things from different *national* perspectives. And the tax authorities of the investor's government and of the host government frequently disagree as to the fairness of the transfer prices that determine the tax share for each.

Over the past several decades, the multinational firms have held the advantage in this particular game. The host nations have lacked sufficient data to claim what they consider their just shares, and their need for the multinationals' investment has outbalanced the need of the multinationals for any one host nation's materials or markets. In recent years, however, this balance of advantage has shifted, especially for those newer nations on whose raw materials the industrial nations have become increasingly dependent. Whether by negotiation or by unilateral action, the raw material nations have steadily increased both their tax share and their ownership share of the operations conducted within their borders. The swing has been greatest in the OPEC nations and the copper nations, where the host government is now virtually the sole owner of the raw material venture, and the multinational firms are little more than hired managers and export marketers.

2. The Trend Toward Global Oligopoly

Some critics, such as Richard Barnet in his book, *Global Reach*, also blame the multinationals for what they perceive as the growing trend toward global oligopoly. In their view, the advance of the multinational firm into foreign markets, not only as an exporter but also as a local manufacturer and distributor, has resulted in a wave of mergers, acquisitions and cartel-like arrangements among the survivors. These critics see the resulting advantages of size—in economies of scale in manufacture, marketing and research, in capital formation, in technology

transfer, and in diversification of risk. But they see these advantages as requiring domestic competitors to combine themselves into large units, often with the moral and financial support of their own governments, and to embark on multinational expansions and acquisitions of their own. According to these analysts, each of the world's principal industries is now dominated by a relatively small number of multinational firms with sufficient market power to control prices and extract monopoly profits, both at home and abroad. The classic free market in which no competitor is large enough to possess such power has disappeared.

It is true that as technology has become more complex, as capital requirements have become larger and the expansion of markets has made it feasible to realize economies of scale, the number of firms in most industries in each national market has been steadily shrinking. At the same time, the absolute size of the survivors has grown. The automobile industry is a classic example. But whether the result has been to create monopoly power, and if so whether the multinational form of enterprise is responsible, are questions open to considerable debate.

A strong case can be made that the auto firms of the 1950's had greater price discretion and enjoyed higher rates of profit in the relatively isolated domestic markets which characterized the business in that era than any firm enjoys in the largely international auto market of 1978. Even though the number of domestically owned firms in each nation has gone down since 1950, the total number of domestic and foreign firms competing in each national submarket has gone up. In every national submarket foreign firms are making new entries both as importers and as manufacturers. They account for significant and growing market shares—a strong sign of competitive health. And there is no nation in which the automobile manufacturers have been earning greater returns than industry at large.

We must also recognize that antitrust theory and the free-market philosophy of business organization have never been widely accepted outside the United States. Cartel and *zaibatsu* are not American terms. To the extent that American firms have

moved into European and Japanese markets, they have brought with them a competitive spirit and a legally enforced respect for antitrust doctrine that has probably raised, rather than lowered, the competitive level of the local economy. Moreover, the example of antitrust's effectiveness in stimulating the growth of the American economy has led to the development of increasingly effective antitrust regulation in the industrial nations of Western Europe and in Japan. On balance, the multinational firm has probably been a pro-competitive force wherever it has flourished.

3. Bribery

With the revelations of recent years, we now know that many firms have done things that public opinion in the host country—and sometimes in the headquarters country as well—regards as manifestly improper. Some multinational firms have made covert attempts to influence the foreign relations or domestic politics of a host nation. Examples of such transgressions are the secret financing of political parties, ITT's secret offer to contribute $1 million toward the ousting of President Salvador Allende of Chile, and the occasional willingness of multinational firms to provide "cover" for the intelligence personnel and activities of their home states.

The number of such covert transgressions has probably been small. Whatever justification for them might have been valid in the early days of the cold war (*e.g.*, in checking the growth of the Communist parties in Western Europe after World War II), we have reason to hope that they are passing into history. But even before memory of them has faded, another type of covert multinational offense has loomed into prominence—bribing public officials of the host country. Because it is so current and because it illustrates why the improper conduct of a multinational firm is resented so much more than the identical conduct of a national firm, it is worth discussing in some detail.

The facts were discovered largely by accident. In the process of detecting and correcting the secret corporate campaign contributions that featured in the 1972 elections, the U.S.

government stumbled upon a much richer vein of business bribery with worldwide ramifications. Not many people are aware of the link between these events or of its significance.

When Mr. Nixon's men began to finance his reelection campaign, they naturally turned to the business community. Maurice H. Stans and Herbert W. Kalmbach, sailing under White House orders, asked dozens of business executives for $100,000 apiece, much more than in prior campaigns. They represented that money contributed before April 1, 1972, the effective date of certain disclosure amendments to the campaign financing law, would not have to be reported. Traceless cash was of course acceptable.

Most business leaders, Republican though they were, declined to put up such large sums. But a number succumbed. No doubt, they were tempted by the chance to do so in secret and fearful of the consequences if they refused while their competitors were coming through. Since many could not afford to use their personal funds, they looked for a secret company source of cash that could be used for what they thought was the company's benefit.

The assistance of a foreign sales agent or consultant, who banks in a place like Switzerland where the tax and exchange restrictions are loose, provides a convenient means of generating secret corporate cash. Sometimes the agent is a foreign subsidiary of the firm itself. The agent submits an outsize invoice which is paid by check so that the records are clean. On a later visit to the United States, the agent returns an agreed part of the proceeds in cash. The cash then goes into a "black" or off-the-books account concealed from the auditors, and can be used for any business purpose without being recorded.

A modest number of the Nixon $100,000 contributors employed this method without informing their boards or their auditors. They knew that corporate campaign contributions to Federal candidates were illegal. But relying on the Stans advice that the contributions need not be disclosed, they did not expect to be caught. We might never have found out but for the citizens' lobby called Common Cause and its lawyers. They de-

cided to challenge in court the Stans theory that contributions before the April 1, 1972 deadline did not have to be reported, and they won. When the Nixon finance committee had to report the contributions in the names of the business executives who had been solicited, those who had used corporate funds could not prove that the contributions had been personal. By 1974, more than 20 major corporations and their officers had pleaded guilty to violations of the campaign financing laws.

At this point, the Securities and Exchange Commission (SEC) entered the game. Part of the SEC's mission is to require publicly held companies to disclose to investors all material facts about their business. True, the amounts were too trivial to be material to the financial health of most of the firms involved. But the participation of top management officials was germane to their honesty and integrity, as well as to stockholder decisions on their reelection as directors. The SEC therefore required that the political contributions be disclosed to shareholders, and that companies commit themselves to investigate whether any other illegal contributions had been made. Since a good part of the campaign cash had been generated by overpayments to foreign agents, the SEC required that all agent accounts be examined to check whether cash had been returned to the United States. In an inspired moment, Stanley Sporkin of the SEC enforcement staff also insisted that the agent accounts be checked for "other improper payments."

By intuition or accident, Sporkin had hit the jackpot. Outside directors, outside auditors and outside counsel—goaded by their own potential damage liability if they failed to make a thorough inquiry—took on with vigor the task of making the independent investigations. They found that in about half the cases, the foreign agents of the same companies had indeed made "other improper payments." In fact, millions of dollars had been paid directly, or through middlemen, to foreign government officials, foreign political parties and public and private purchasing agents for state enterprises.

Outside directors and auditors of companies that had resisted the Nixon levies also began to inquire whether their own firms

had made similar foreign payments. By mid-year, 100 American firms (including about 10 percent of the *Fortune* 500) had disclosed questionable foreign payments totaling more than $100 million over a five-year period. Most of these firms were multinationals. In a minority of cases, someone in top management had known or approved of the payments. In some instances, U.S. government officials had advised or encouraged the firms to make them.

For those firms that disclosed voluntarily, the SEC did not insist on identifying the foreign countries or officials involved. Instead, it accepted the companies' plea that publicizing these names could hurt their business, and do more harm than good to the stockholders' investment interests. But congressional committees were not so fastidious. They subpoenaed company files and published the juiciest news, much of it highly incriminating as to the companies, but largely hearsay as to the foreign officials allegedly involved. The shock wave of the congressional disclosures was relatively mild in Washington. But it went right off the Richter Scale in Western Europe and Japan, where it gave an enormous boost to the opposition parties of the left. Even the absolute monarchs of the Middle East were embarrassed and displeased.

All in all, the overreach of Mr. Stans and the business community's response have led to consequences which neither they nor Common Cause, nor the SEC for that matter, could have foreseen. Among other effects, the image of the ethical and efficient international firm, despite its basic validity, has been badly tarnished.

It should be noted that after the most intensive investigation and disclosure of their internal records that has ever been made, only a small number of the American multinational firms appear to have engaged in significant improprieties. Few of the firms based in other countries have investigated or disclosed anything at all. But no matter how rare international business bribery may actually be, the international community now believes bribery to be widely prevalent. We need a way to dispel that impression, because it endangers a fundamental value of free international

markets—that consumers everywhere benefit when private firms compete internationally on the basis of price, quality and service. It also arouses the deepest political suspicions about the willingness of multinational firms to subvert national governments for their own business purposes. For both these reasons, the continuing acceptance of the competitive multinational firm may become less attractive to host states than the increasingly popular alternative of the noncompetitive state enterprise.

It is true that it takes two to tango. Certainly, there are at least as many public officials seeking bribes and kickbacks as there are firms looking for someone to corrupt. Indeed, when money passes, extortion may describe the act more precisely than bribery. In many countries, the public is also inured to corruption as a habit of centuries. But ordinary people everywhere still resent being cheated by the corruption of their own officials, particularly when the payment comes from abroad and arouses the fear of foreign subversion. To the extent that the multinational firms participate, and their headquarters governments affirmatively encourage such actions or remain indifferent to them, the firms and their headquarters governments are deeply offending world public opinion, and they need to make amends. How they are going about it is described in Chapter 4, and what still needs doing is suggested in Chapter 5.

4. Independence from National Control

The fourth and perhaps most serious complaint against the multinational firm is that it acts in ways that host and headquarters nations perceive to be in conflict with their own economic and social goals, and that it is not nearly as responsive as domestic firms to the host country's official intervention and control. Both parts of this charge have a good deal of substance. Whether the result is good or bad for the host or headquarters nation or for the rest of us is a matter for fair debate.

As producers and sellers in many countries, multinational firms share the general interest in the stability and steady growth of every economy in which they do business. They will often manufacture in the host country to strengthen its economy even

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if they could produce the same item more cheaply elsewhere, so long as the differential is not too high to endure. But multinational firms exist to maximize their global earnings, rather than their earnings within any one country. They want to mine and manufacture where costs are lowest and to sell where margins are highest. Autarky has no value to them. Whether employment or exchange balances rise in one country or fall in another is not their primary concern.

Governments, on the other hand, want to maximize domestic employment and exchange balances. They may share the liberal economic conviction that free trade and comparative advantage are best for everyone in the long run. But politicians must survive in the short run. Few are brave enough to resist employment and protectionist measures that may stave off immediate hardships for their constituents. When a multinational firm decides that it would be more efficient from a global viewpoint to transfer operations or funds from one nation to another, or to start or stop a mine or a factory in Country A rather than Country B, the disfavored country is bound to regard the decision as unwise and unfair.

If the firm is domestically owned, the state has numerous direct and indirect ways of assuring that such decisions are made as the state wishes them to be made. It can withhold exchange approval or financial support for an investment or transfer of funds abroad. It can "jawbone" by appeals to patriotism or by veiled threats to withhold other official privileges from the firm. If the firm is already state-owned, it can simply direct the firm's managers to conform. As a last resort, it can even nationalize an uncooperative private firm.

Multinational firms, of course, are far more difficult for host nations to control. A multinational can run down its funds or its level of operations in one country and run them up in another in ways that are hard for the host nations to regulate. It can make a new investment in Country A rather than in Country B without in any way involving its subsidiary in Country B, even though the latter's business is directly affected. And since multinationals frequently process materials or components in a sequential

series of countries before marketing the end product, their subsidiaries in any one host country are much harder to nationalize than any domestic firm.

Before we can judge the merit of the claim that multinational firms unreasonably impair the power of host governments to manage their economies, we need to ask whether it is useful for any nation to exercise full control over all segments of its economy. The mere question would be insulting to many nations, perhaps including our own. Most nations believe firmly in the sovereign right of any nation to manage its "internal" economy as it sees fit.

But as we have grown more economically and politically interdependent, nations have knowingly contracted away large parts of their economic sovereignty for the mutual benefits that interdependence can bring. The General Agreement on Tariffs and Trade (GATT) limits the freedom of any member to raise protective tariffs and establish import quotas, or to subsidize its own exports in a discriminatory manner. The Bretton Woods Agreement limits the rights of all members of the International Monetary Fund (IMF) to manipulate their currencies or exchange regulations in violation of agreed rules. The Treaty of Rome goes even further to build a European Common Market by restricting the right of any member to curtail the trade and investment of other members within its borders. While there may be a case for subjecting multinational firms to some greater degree of national and international regulation, the case cannot validly be rested, as many in host nations and some in headquarters nations contend, on grounds of national sovereignty or national economic self-determination alone. To the contrary, the value of the multinational to every economy it enters rests largely on the multinational's global rather than national view of its own economic interest. Its relative independence from national myopia and control affords it a degree of economic rationality that can be a checkpoint against the capacity for economic irrationality politically inherent in any government's efforts to manage its own economy. The merits of this view are considered in the next chapter.

3

The Multinational Contribution to National Economic Rationality

Since the writings of Montesquieu more than two centuries ago, it has been a centerpiece of political theory that the powers of government work best when there is some degree of separation and independence among its branches. Government also works best when it is counterbalanced by the power of other institutions, such as the free press, political parties and the ballot box.

The principle of countervailing power has particular importance in this era of increasing governmental intervention in the economies of nations. For two centuries since Adam Smith, it has also been a centerpiece of economic theory that monopoly is a wasteful and inefficient structure for the production of goods and services. We owe to Smith much of our understanding of competitive markets, and of how broad goals of income distribution, resource allocation and economic growth are achieved as by-products of self-serving individual decisions to buy and sell.

Karl Marx believed that economic enterprise should be owned and controlled by the state. But after a century of experience in applying Marxian theory, it is plain that this basic advantage of competitive markets over monopolies holds true even when the monopoly is held by the government, and regardless of whether the government itself is democratic or totalitarian. In most of

the industrial world, democratic parties committed to the socialist principle have been unable to overcome this stubborn reality. All industrial nations, from the most capitalistic to the most socialistic, continue to make some use of competitive markets to achieve their economic goals. A wide degree of competition among independent economic units appears to be indispensable to efficiency, innovation and the growth in living standards and job opportunities that are the primary goals of economic activity.

As the political economist Charles B. Lindblom notes in his recent book *Politics and Markets*, society's need for the market mechanism has conferred a considerable degree of veto power on the business corporation. The corporation must be induced to invest at risk by the opportunity of an adequate return. As a result, its managers and stockholders may have greater power over government economic policy than other citizens of one-man, one-vote democracies.* Whether the business corporation ought to be more fully harnessed to the will of the majority—and whether the costs in market efficiency would be worth it—are central policy issues in every industrial democracy.

The Growth of Governmental Enterprise

All of this might have little to do with the economic value of *multinational* firms to any nation, if each national government planned its economy solely by methods of regulation, and if private domestic firms within that economy provided the degree of market competition necessary for economic health. But for better or worse, governments in most of the industrial nations have moved far beyond mere regulation. They now own or finance a large part of the economic activity that goes on within their borders. In the Soviet bloc, government ownership of the principal economic entities is virtually universal, with results that fall well below those of the nations in which part or all of the principal entities are still privately owned. Even in many of the

*In market systems, corporations are not the only group with this kind of non-democratic veto power. The same is true of workers, farmers and, to some degree, consumers.

industrial democracies, the government owns or finances major segments of industrial activity.

Nor is the state's presence limited to such industries as electric power, communications and rail transport where "natural monopoly" may be more efficient than competition. In steel, government owns the principal firms in Britain, Italy, Spain, Brazil, Venezuela, Argentina and Mexico, and finances the leading firms in Japan and France. In oil, government now owns the principal firms in every OPEC nation, and all or the controlling interests in the home-based firms in Britain, France, Germany and Italy as well. In coal, government owns or finances the principal firms in Britain and most of Europe. In motor vehicles, government owns all of, or the controlling interests in, the leading home-based firms in Britain, France and Germany. In computers, government owns or finances and effectively controls the leading firms in Britain, France and Japan. In aerospace, government owns the leading home-based firms in France, Germany and Britain. In airline transportation, government owns all of, or the controlling interests in, the leading national firms everywhere except the United States. Throughout Western Europe and in such rapidly industrializing nations as Brazil and Iran, government-owned firms probably account for almost half of the total GDP.

In some ways, government ownership of a dominant firm in such industries—none of them "natural" monopolies—is even worse than private ownership of a dominant firm. A private monopolist can be expected to make business decisions according to rational monopoly-oligopoly theory. The private monopolist adopts or rejects innovations, expands or contracts markets and sets lower or higher prices according to a dominant criterion—maximization of the firm's profits. In so doing, the private monopolist is unlikely to create as much economic growth, employment opportunity and improvement in living standards as a competitive industry structure. But at least it will create as much as is consistent with the maximization of its profits, and it will reinvest as much of those profits as will in turn yield greater profits.

A dominant government-owned firm, however, may not even do that much. A government, especially a democratic one, is far less likely to make its decisions on rational economic grounds. It may continue to operate high-cost plants and mines, and withhold new investment in newer and lower-cost facilities at different locations, because it is reluctant to create unemployment in some areas despite the offset of creating new employment in other areas. The British Coal Board operates mines in Scotland that have lost almost $40 million per year—over $1,600 per year per man employed—rather than expand operations at other mines which earn at least some profit. Recently, the British government has directed the British Steel Corporation to postpone once again its plan to build a new integrated steel plant in South Wales and to shut down its nearby outmoded and high-cost plant at Shotton in North Wales, because of the political risks of the resulting dislocations at Shotton.

These decisions may be appropriate for the short-term political reasons that usually dominate the thinking of politicians mindful of the next election. But they are irrational economically and extremely inefficient and costly in the long run. When they occur in such basic industries as coal and steel, they not only add to the costs of power and of all steel-containing products, but also to the budgetary deficits needed to finance loss operations, and to the lack of funds for investment in more efficient facilities. They thus impair the growth and efficiency of the entire national economy, and its ability to compete with other national economies in the import and export markets upon which all national economies now depend.

Of course, the need for preserving competition in the industries now dominated by government-owned firms does not necessarily mean that the competition has to be supplied by foreign multinational firms. Theoretically, it might be supplied by privately owned national firms, or by another nation's state-owned firm in the same industry. To a degree, this is now happening. But when the government itself competes through its state-owned firm, it is asking too much of human and political nature for the government to play fairly with existing domestic

competitors and potential entrants who want to increase their own market shares at the expense of the government firm's share. This is particularly so when, as often happens, the government firm is losing money and its losses and investments are being funded from the public treasury.

Consider, for example, the British government's 1976 decision to cancel the transatlantic route authorizations that its own Civil Aeronautics Board had issued to Laker Airways and British Caledonian Airways, two privately owned British airlines. Fearful that these two private firms would take both international and domestic traffic away from the government owned British Airways, the government reversed the policy of its own expert regulatory body and deprived the public of competitive service at lower prices. Only the intervention of a British court prevented the government, for the time being at least, from suppressing this competitive threat to the state-owned firm.

Effective competition between dominant firms owned by different governments seems equally unrealistic. True, the government-owned motor vehicle firms in the EEC nations, while each dominates its own national market, also compete vigorously in each other's national markets, and behave almost as independently as their privately owned competitors. But these are markets with a number of private firms as well, and there is no opportunity for the government-owned firms to cartelize the market. When the opportunity does exist, government-owned firms—unrestrained even by the modest antitrust rules that control private firms—find international cartel arrangements irresistible.

OPEC is the most classic, and in recent times, the most successful of all cartels in eliminating competition among its members. It has already achieved a larger price increase in a shorter period than any cartel in history. The European airlines are another case in point. With few exceptions, the only allowed competitors between London and Paris, and between all other inter-European city pairs across national borders, are the two state-owned airways of the nations at either end of the pair. They do not compete for traffic as private airlines do. Instead,

they pool their services to create a monopoly. They limit the number of flights to achieve monopoly load factors and to charge monopoly prices, and they divide the revenues equally. As a result, air fares between London and Paris, or between any other European points, are more than twice the air fares for comparable distances in the United States. This is true even though the same equipment and fuels are used and the wages paid to European flight personnel are lower.

The state-owned European airlines have also succeeded in establishing the International Air Transport Association, a cartel-pricing system for transatlantic flights to which the American privately owned airlines have been forced to belong. And only American resistance has so far prevented the European airlines from setting up similar "pooling" arrangements among all the airlines serving each transatlantic city pair. Indeed, the British government has now forced the United States to accept a transatlantic cartel concept. Acting in the interest of its wholly owned British Airways, Britain recently withdrew from the Bermuda Agreement under which Britain and the United States had agreed not to restrict the frequency or capacity of flights by any carriers flying between the United States and Britain. Britain then succeeded in negotiating the first stages of a cartel agreement with the United States. Under this agreement the number of carriers and the capacity of flights between U.S.-U.K. city pairs are likely to be limited by agreement from here on out.

Nor can trade competition between national economies, important and useful as it has now become, serve the same function as internal competition within a single national economy. It is true that external trade competition and the reduction of trade barriers exercise some restraint on price and wage levels within any single nation. The national economies within the Common Market exemplify how effective competition between the members can be. But even in the Common Market, the largest share of each domestic market is held by domestic firms. Where there is not enough competition among the domestic firms within each major segment of a nation's economy to assure the efficiency and rationality of that segment, external trade

competition cannot be relied on to supply the missing stimulus.

Multinationals–the Competitive Yardstick

Where then is the essential yardstick of competitive rationality to be found? In the important national economies that are now dominated by state-owned or state-financed enterprises, the best yardstick may well be the multinational firm. The external competition provided by international trade can be restricted or shut off by a variety of protective measures when its pressure becomes too intense. The domestic manufacturing and marketing operations of multinational firms, on the other hand, are much more difficult to curb. The multinational firm is less influenced by the domestic political concerns that sway the decisions made by state enterprises and the governments that own them. The multinational firm is more likely than any domestic firm to make its major decisions on the basis of comparative costs and profit expectations between the domestic market and other markets. The multinational firm has resources and opportunities beyond the borders of any single nation, and is free to expand or contract its activities in any one market according to whether the competitive and regulatory climate is better or worse elsewhere.

The value of the multinational firm as a competitive yardstick is most evident in industries that are not yet totally dominated by the state-owned firms, and that have large export markets. The motor vehicle industry is a good example. In France (Renault) and Britain (British Leyland), the state-owned firm has the largest market share in its own country. So does the German firm (Volkswagen) in which the federal and state governments own the largest interests. But in each case its domestic share is within the range of 35 to 65 percent, and it depends heavily on exports to other markets. The recent history of British Leyland, Renault and Volkswagen has presented many occasions for the kind of political decision-making that has been so damaging to the efficiency of the state-owned coal and steel industries in Europe. But at least partly because the state-owned automobile firms must compete for domestic and export market shares with Ford, General Motors and Chrysler, who manufacture along-

side them, and with Fiat, Toyota, Datsun and Volvo, who ship into all their markets, they have remained nearly as efficient and rational as their private multinational competitors. They are far more efficient and rational than their state-owned siblings in coal and steel.

In industries like motor vehicles, computers, aerospace and oil, there seems to be some basis for concluding that national economies need the multinational firms not merely as investors, employers and competitors, but also as yardsticks of efficiency and rationality for the state enterprises with whom they now compete. The same claim can be made for aluminum, now beginning to come under significant state ownership. A similar trend is evident in heavy machinery and shipbuilding, as well as in pharmaceuticals, in which the British Labor party has proposed that the state take over a leading domestic firm. And if the French left had won the 1978 election and carried out its program to nationalize the leading French-owned firms in all major sectors, the rationality of the entire French economy would have had to depend on the competitive spur provided by exports from other parts of the Common Market and by the French operations of the multinational firms.

Even in circumstances where private firms require temporary government financial support, the multinational firm is better positioned to work out its problems on rational economic terms than the domestically owned firm. The British motor industry has been plagued by low productivity for a decade. Its labor hours per unit have been almost double those in other nations. When the privately owned British Leyland required government aid in 1974, it had to accept whatever terms the British government saw fit to impose. But its employees could count on keeping their jobs under state ownership. They knew full well that the company and its shareholders had no alternative except shutdown—an alternative politically unacceptable to an elected government with a narrow parliamentary majority. As a result, they did less than the employees at the Ford and General Motors plants in Britain to improve productivity or to reduce the number of work stoppages that have done so much to lower

output and increase unit costs. Ultimately, the government became the investor of last resort and acquired majority ownership of the company.

But when Chrysler got into similar difficulties in its own British plants in 1975, it was able to negotiate much better terms with the government. Unlike British Leyland, it could leave and would have left Britain if financing could not be obtained, and it was able to offer a substantial new external investment of its own if the government provided the loans it requested. Chrysler was also able to negotiate much better terms with its employees for improving productivity, because its ability to leave Britain was equally apparent to them. Chrysler's management was severely criticized in Parliament and the British press for its tough bargaining. "Ultimatum," "piracy" and "hijacking" were among the minor epithets applied to its conduct. But Chrysler has since achieved a far more satisfactory turnaround, and a much more satisfactory relationship with its employees and with the government, than has British Leyland.

The lesson is plain. The point on which multinational firms have been most widely faulted is their relative independence from the host nation's control over the business decisions they make. But this is precisely the point that makes them a valuable yardstick of economic rationality, and that host nations, in their own self-interest, ought to weigh in the multinationals' favor.

Host nations have no monopoly on economic irrationality. Some critics within the United States, home base for almost half the multinationals, have been equally irrational. They accuse the U.S. multinationals of exporting jobs and investments "merely" because of "callous" business judgments that there are more advantageous profit opportunities abroad. To the contrary, the fact that both U.S.- and foreign-based multinational investment and employment can move in and out of this country enables these firms to perform a valuable function in maintaining the efficiency and the profit opportunities within the U.S. economy that are needed to increase our own employment and growth.

Unfair tax and other incentives offered by foreign countries do distort the relative efficiency and attractiveness of foreign

markets. As suggested in a later chapter, corrective international measures to prevent such artificial distortions are entirely appropriate. But it would plainly be against the self-interest of the U.S. economy to impose equally artificial restrictions on U.S.-based multinationals, and thereby prevent them from making the business decisions most rational from a global point of view. The United States above all nations should have the sense to reject any form of mercantilism. As the most productive segment of the interdependent world economy, we have more to lose than anyone else by a return to policies of national autarky.

It may sound strange in a democracy to urge that corporations be allowed to make investment decisions in their own self-interest that a majority-elected government opposes. But we and other industrial democracies have no substitute as yet for the efficiency of market mechanisms. Until we devise a substitute, we ought to be cautious about dismantling the proven mechanisms we have.

4

Current Efforts to Regulate Multinational Firms

We need better ways to regulate multinational firms—to preserve and enhance the useful functions they perform, to prevent a recurrence of the harms they have occasionally caused, and to correct both the real and apparent inequities that are now seen to exist. Before considering how to do better, let us turn first to what is being done today.

The firms themselves have taken a number of steps to meet the criticisms leveled against them. Many host nations have taken national measures to correct what they perceive as abuses. Some headquarters nations have acted to deter various foreign business practices by their own firms. At the international level, there is a growing movement toward multistate regulation, ranging from the voluntary "Guidelines for Multinational Enterprises" adopted in 1976 by the OECD to the proposed Code of Conduct for Transnational Firms now being drafted within the Economic and Social Council of the United Nations.

As noted in the previous chapters, the four principal criticisms of multinational firms relate to fair shares, oligopoly power, bribery and other improper activities in the host country, and independence from both host country and headquarters country control. In this chapter we examine what is currently being done—and some ideas as to what might be done—about each of these matters. Under each heading we discuss actions

first by the firms themselves, second by national governments, and third by way of international cooperation and agreements.

Fair Shares

Multinational firms, like all of us, try to keep down their taxes in any legitimate way the laws allow. They have no particular bias for or against paying their tax bills to one country rather than another. The total paid to all countries is what counts. When the combined effect of applicable national tax laws permits, multinational firms have gone quite far to assure fair shares to host nations. Most notable are the very large "royalty tax" payments made by the multinational oil companies to the oil-producing nations so long as they were deductible from the taxes due to their headquarters countries. But an individual firm can hardly be expected to pay a larger tax to any host government or to its own headquarters government than the laws of that government require.

Host governments and headquarters governments have adopted laws and regulations to assure themselves of fair tax shares. Host governments, of course, are caught between their desire to attract investment by low tax rates or heavy investment credits and write-offs during the start-up period, and their desire to obtain fair tax revenues after the project becomes mature. In the mature stage, their principal concern is with the company's practices as to transfer pricing and the allocation of overhead costs. But transfer pricing and cost accounting present arcane and impenetrable problems for the most sophisticated of tax collectors, particularly when they have access only to the books of the local subsidiary. As a result, host country tax authorities tend to make arbitrary shortcuts that maximize the local subsidiary's income subject to host country tax. Since the tax authorities of the headquarters country often do just the opposite, the multinational firm may suffer the worst of both worlds.

Headquarters governments have a much better chance of assuring fair tax shares for themselves, but there is wide disagreement as to what should be their fair tax share of income

earned abroad by the foreign subsidiary of a domestic firm. There is general agreement that when income is actually repatriated to the domestic firm, the headquarters government is entitled to tax it after allowing full credit for income taxes paid to the host governments. But agreement stops there. The biggest dispute is whether unrepatriated income of a domestic firm's foreign subsidiary should also be taxed by the headquarters government. The United States and other headquarters nations presently allow multinational firms to postpone income taxes on the foreign source income of their affiliates abroad until the time, if ever, that the foreign income is transferred to the headquarters firm.

This policy is now under broad attack. Sometimes it results in little or no tax paid to anybody. Some host governments grant long tax exemptions, reductions or long deferrals to induce the multinational firm to enter and expand. As a result, multinational firms now have a significant tax incentive to maximize foreign source income and retain it in foreign firms for reinvestment where it was earned or for investment in some third country, rather than to repatriate it to the headquarters country.

Moreover, the investment and operating decisions of such firms can be influenced by differences among national tax rates and policies. As a result, the true economic efficiencies of investing or operating in one nation rather than another—the classic economic justifications for the multinational firm—become somewhat distorted. It probably overstates the case to say that when the headquarters government permits deferral, foreign tax incentives lead to the "export of jobs" from the headquarters country. But such incentives probably do influence business decisions about whether to locate a new foreign plant (e.g., one intended to serve the entire Common Market) within the borders of one foreign nation rather than another.

Many U.S. critics of the multinational firm, as well as students of tax reform who are neutral on multinational issues, have strongly urged that the United States abolish deferral. The Carter Administration has now put such a proposal before the U.S. Congress. The multinationals, of course, argue vehemently

to the contrary. They point to the value of their foreign investments in promoting headquarters country exports, as well as to the favorable exchange effect of the resulting earnings. They cite the competitive disadvantage they would suffer if their tax deferral at home were ended while their domestic and foreign competitors in the host country enjoy the host government's tax concessions. They also argue the inequity of paying current headquarters taxes on earnings abroad that they may never be able to repatriate fully because of exchange rate fluctuations, or because the host government's exchange restrictions or tax policies discourage such transfers.

There is much room for argument over the economic justification and tax equity of this deferral policy. The postwar policy of extra tax encouragement for foreign investment seems to have little economic or political relevance today, except perhaps for investments in the third world. And as multinationals continue to expand their manufacturing activities within the host country rather than import finished products from the headquarters country, the presumption of a favorable effect on the headquarters country's balance of payments, while still valid as a matter of classical free trade theory, becomes more blurred.

The only unanswerable argument of tax equity is that foreign income currently taxed by the headquarters government might never be capable of effective transfer to the headquarters country because the tax or exchange policies of the host government make current or future transfer impracticable. This inequity could perhaps be removed by methods short of deferral. For example, the headquarters government could tax foreign income currently and allow a deductible loss in later years for earnings that the host government never permits the taxpayer to repatriate, or that have declined in value because of exchange rate fluctuations by the time they are repatriated.*

But an end to the U.S. policy of deferral would not resolve the

*The home state could also allow some type of special credit or deduction for foreign dividend withholding taxes on upstream payments to the U.S. parent when such taxes, together with the subsidiary's corporate taxes, exceed what can normally be credited against the U.S. tax liability.

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basic problem of fair tax shares. That problem stems from the disparity of national tax policies in a world dominated by international business transactions, and from the unfairness that results when any country grants greater tax incentives than other countries in order to attract capital away from other countries. That problem, of course, can only be solved by measures of international cooperation and agreement.

At the international level, however, little about fair tax shares and fair tax incentives has been done to date. The OECD guidelines call on all firms and governments to adopt fair methods of allocating income between local subsidiaries and their affiliates abroad. UN task forces have studied methods of cost and income allocation for tax purposes, and a few bilateral agreements on this subject are being negotiated. But there is no project to date to establish international rules as to allocation, tax rates or the line between fair and unfair tax incentives to attract foreign investment. The possibilities of such an international structure are examined in the following chapter.

As noted earlier, the other important aspect of "fair shares" is in the earnings and management control that go with equity ownership. Individual firms have made some effort to assure the residents of host nations a more equitable share in earnings and control. Many multinational firms have listed their shares on the securities exchange of each host country to attract investments by its residents. But because the exchange controls of many host nations impose severe penalties on investments in foreign shares, and because few host nations have sophisticated securities markets, the resulting percentage of ownership by host nation citizens is usually infinitesimal. Many firms have also appointed a few nationals of the host country to be executives or directors of the local subsidiary or even of the headquarters firm. While this provides the color of participation in control by residents of the host nation, it rarely provides the substance.

A frequently urged method, invariably popular in the host country, is to make the local subsidiary a joint venture in which host country nationals own somewhat more or less than 50 percent. For an enterprise of significant size, it may be difficult

to find local private investors with that much capital to invest. The problem is aggravated where the equity securities markets are undeveloped, and where most of the funds for industrial investment come from the government. Moreover, joint ventures within an otherwise integrated multinational enterprise create a multitude of problems in transfer pricing, and in allocating research and overhead costs. They also complicate the movement of funds from one part of the enterprise to another in ways that will be perceived as fair not only by the tax authorities of the host nation and the headquarters nation, but also by two or more disparate groups of shareholders.

Certainly, joint ventures with host country nationals can be useful, particularly with a single existing firm in the host nation or with the government itself in a mineral- or oil-producing venture. But large multinational firms have valid reasons of internal efficiency for avoiding them when they have a choice. In some countries, they now have no choice because local laws require specified percentages of local ownership as a condition of conducting operations within the host country.

There is, however, one other fascinating possibility suggested by the unique structures of two major multinationals, Unilever and Shell. Both of these firms began under mixed British-Dutch private ownership and management. This continues today, even though the firms' shares are now traded on all international stock exchanges and are widely owned throughout the non-Communist world. While Unilever and Shell have different corporate structures, they share one unique feature. There is no single company at the apex of each structure. Instead, there is a British top company with primarily British shareholders and a Dutch top company with primarily Dutch shareholders. All of the operating subsidiaries are owned by one or both of these top companies. In Unilever, each is wholly owned by either the British or the Dutch top company, and in Shell each is 60 percent owned by the Dutch company and 40 percent owned by the British one. But by special agreement in both cases, the earnings of the total enterprise are calculated as if the British and Dutch top companies were a single firm. In Unilever, this is car-

ried to the point that all earnings are divided equally between the two top companies, regardless of whether they originated in one top company's subsidiaries or in the other's.

Only Unilever and Shell follow this policy of sharing the returns of the entire enterprise among the shareholders of two top companies incorporated in two different countries. Not even Unilever or Shell goes so far as to treat local shareholders of its affiliates in host countries on the same basis. For the most part these affiliates are wholly owned by the parents, in the usual pattern of the multinational firm. But even when the affiliates have local shareholders (e.g., Shell's affiliate in the United States), they participate only in the earnings of the local affiliate. Yet in principle, it should be feasible to allow the residents of each host country to buy shares in the subsidiary in that country and to elect a proportionate share of the directors of that subsidiary. At the same time the entire multinational enterprise could function as if each subsidiary was 100 percent owned by the headquarters company, with a single profit calculation for the enterprise as a whole, and with the same earnings and dividends per share for the shareholders of any company in the group. There would be complex tax, accounting and exchange problems to sort out under the laws and practices of many nations, but they do not seem much more complicated than those which have already been solved at the British-Dutch level by Unilever and Shell.

If these problems could be resolved, the result might go a long way to satisfy the desire of host nations for fair shares in the ownership of multinational firms, and at least part of the way to satisfy their desire for control. Host nation investors could concentrate their investment in the local subsidiary, and have a significant and perhaps a controlling voice in electing directors of that subsidiary. They could share in both the earnings and the dividends of the entire enterprise and in the appreciation of its market value exactly as if they owned shares of the multinational firm itself, without incurring the exchange penalties their own government may impose on the purchase or holding of a foreign security. But before any such change could be widely adopted, a good deal of international coordination of national

tax and exchange regulations and national corporation laws would have to be negotiated. More importantly, a willingness to innovate in this manner would have to be demonstrated by the multinational firms themselves.

Many host governments try to assure fair shares of local ownership and control by legislation. The United States has for many years forbidden foreign majority ownership of its regulated common carriers in communications and air transport for national security reasons.* Many nations apply the same majority rule to petroleum development; some forbid any foreign ownership whatever. Australia generally requires at least 50 percent Australian ownership of major new mineral ventures. Mexico mandates that its nationals own a majority of voting shares of most industrial firms. India has a similar policy.

Laws of this sort appeal to the instinct of any nation to control its own economic destiny, but in practice they are usually self-defeating. They have recently led IBM to withdraw entirely from India—a loss which the Indian government publicly regretted. They discourage initial multinational investment as well as subsequent expansion. They divert scarce local capital into ventures that foreign capital is willing to finance, and reduce the limited supply of local capital available for other needs. They force foreign firms and local businessmen into hasty marriages—sometimes arranged by the host government to benefit its own political favorites and the families of public officials—that may well prove incompatible. When the local businessmen lack capital of their own, the local share is usually bought now and paid for later out of profits that may or may not materialize, thus combining the worst features of leveraged financing and watered stock. But the popularity of these laws is growing, and once they are adopted, they are seldom repealed.

Perhaps the best to be said for these laws is that they dampen the drive toward more extreme forms of national self-expression such as outright nationalization. Except in the na-

*Ironically, the American railroads were largely financed by European capital. Indeed, until about World War I, it may well have been true that majority ownership of many American railroads was in European hands.

tional resources sector, nationalization of foreign firms has waned in recent years, despite the strong desire of many third world nations to "delink" the multinational firms from the local oligarchy or establishment, and thereby to facilitate the process of internal social change. Even in the industrialized nations where state ownership is on the increase, the firms selected for nationalization are usually domestic rather than foreign firms. When a recent British Labor party study proposed selecting one leading pharmaceutical company to nationalize, it was careful to suggest a British-owned firm. And the French Socialist party's recent campaign plan to nationalize key sectors of French private industry was similarly limited to French-owned firms.

At the international level, even less has been done about how multinationals should be owned and controlled than about how they should be taxed. Before we became so concerned about the ramifications of multinational enterprise, a network of bilateral treaties of "friendship, commerce and navigation" had grown up around the world. These treaties committed each signatory to grant nondiscriminatory (or "national") treatment to the nationals of the other signatory doing business within its borders. But many of these treaties have become dead letters in the face of the national ownership restrictions summarized above.

The OECD guidelines call on member governments to recognize the principle of "national" treatment for enterprises of other OECD members. But the guidelines contain so many exceptions for national security and the right to regulate new foreign investment that the result may prove virtually meaningless. The guidelines, in fact, seem to be less concerned with national treatment of foreign enterprises than with reducing the extent of foreign ownership and control. For example, they recommend that firms "take steps to widen the participation of host state nationals in management and ownership," and that such firms "conform their actions to national economic and social policies." The UN code—if one is ever agreed to—will probably go even further in this direction.

Most nations accept the principle that host nations have the right to nationalize any enterprise within their borders. But that

is the limit of the consensus. As yet, there are no widely accepted international rules or structures to deal with fair shares of ownership and control. Even the principle of just compensation, although fully recognized by the OECD guidelines, is expressly disaffirmed by some less-developed nations—while others recognize the principle but subject it to their own determination as to what is just compensation.

Oligopoly Power

As noted earlier, with the possible exception of petroleum and some other minerals before the recent wave of nationalization in these sectors, the host country's concern about the oligopoly power of foreign-based firms has little foundation in fact. Few foreign-based firms dominate any local market. To the contrary, they often serve as a competitive counter to a dominant state-owned firm or a dominant private firm based in the host country. Additionally, if the foreign-based firm is an American one, its concern about the outward reach of U.S. antitrust laws makes it most reluctant to participate in the horizontal market-allocation arrangements that state-owned and locally based private firms are more likely to join. All in all, the presence of foreign-based firms is probably more of a help than a hindrance to the competitiveness of most host country markets.

Many industrial nations view the extraterritorial reach of the U.S. antitrust laws as an affront to their own sovereignty. But most of them have done very little to insure the competitiveness of their own economies. A few European governments have antitrust laws roughly comparable to our own, and the EEC has an antitrust policy and an enforcing agency that is considerably more effective than the national programs of most member states. Yet in those parts of the world that are concerned most about "foreign oligopoly," national antitrust programs are still in their infancy. Antitrust programs are by definition nondiscriminatory, and most governments are not yet ready to place antitrust restrictions on their own firms, especially the growing number owned wholly or partly by the state itself.

At the international level, virtually nothing has been at-

tempted other than the EEC antitrust program, which is limited to competition within the Common Market area. The OECD voluntary "Guidelines for Multinational Enterprises" urge that such firms "should . . . refrain from participating in or otherwise purposely strengthening the restrictive effect of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition . . ." But the 24 member nations of the OECD have not sought to embrace an international antitrust policy applicable to international cartels or restrictive agreements. Indeed some of them have vigorously protested when the United States has tried to enforce its own antitrust laws against foreign firms which are parties to such alleged cartels or agreements. In some cases (e.g., uranium and shipping), they have objected on the ground that the cartel or agreement was initiated or approved by the protesting government.

In these and many other industries today, agreements among international competitors affect the commerce of all the nations concerned, including the country that invokes its own national antitrust law to govern such conduct. The other affected nations may differ about the need or the scope of such remedies and possible adverse impacts on their own economies. The shared need for international enforcement of common antitrust rules, applicable to trade and investment among all of the industrial democracies, is apparent. But the adoption of such rules is an idea that is still waiting for its time to come.

Bribery in the Host Country

We have noted how the practice of widespread illicit payments by foreign firms to host state officials came to worldwide public attention in 1973 and 1974. We now turn to how the firms themselves, national governments and the international community have responded.

The American-based firms that made direct or indirect illicit payments have already taken effective measures to halt such practices. Spurred by the disclosure requirements of existing U.S. securities law and the potential of personal damage liability for failing to obey these requirements, the directors, top execu-

tives, accountants and lawyers of these firms have recognized their existing legal duty to investigate and disclose past actions that are material either to the financial condition of the company or to the honesty and integrity of its management. They have also adopted rules and procedures to prevent the recurrence of any illicit payments. However, most U.S. firms have continued to permit so-called "facilitating" payments of small amounts to minor officials where this is a customary practice. The moral and legal distinctions between large illicit payments to high officials and small payments to low officials defy close analysis, but the practical necessity to differentiate them has so far prevailed. Most U.S. firms have also abandoned foreign political contributions, even where they are permitted and customary, and even where local law does not require them to be disclosed. Since disclosure of such contributions is now thought prudent in any event under U.S. securities law, and since most host country political parties regard it as counterproductive to receive publicized contributions from foreign companies, the long-standing practice of soliciting and receiving such contributions from U.S. firms is now being abandoned by common consent.

Have European- and Japanese-based multinational firms ceased making illicit payments to high officials of foreign governments and state enterprises? We do not know, because most of these firms have never acknowledged the existence of such a practice, let alone its abandonment. But it seems reasonable to infer that the practice has been and continues to be widespread. Several American companies have participated with these firms in joint ventures that made illicit payments, often funneled through the European partner. There have also been occasional indiscreet admissions by the top officials of European firms. Public opinion in Europe, unfortunately, does not seem to be in the least offended. It is instructive that when Mr. Richard Bolton was forced to resign as chairman of British Leyland because of his remarks at a private dinner defending the practice of "paying bribes to wogs," what cost him his job was the offensive racial epithet, not the admission of "paying bribes."

Despite public indifference in their home states, some of the

world's most important multinationals have been making a serious effort to denounce illicit payments, and to arrive at an enforceable understanding that none will be made anymore. Under the auspices of the International Chamber of Commerce (ICC) in Paris, the most prestigious of all international business groups, a committee headed by Lord Hartley Shawcross has just completed a code of ethical practices after a year of study. The code has now been approved and published by the board of the ICC.

The code is a remarkable document—one that commits multinational firms to go well beyond what most national governments, as we shall see in a moment, have so far been willing to require. It does far more than forbid illicit payments. Since most such payments already violate the criminal laws of the host country, this would merely exhort all firms to obey the law. It also requires ICC member firms transacting business abroad to keep records that would be open to host and home governments. These records would show by amount and name all commissions above $50,000 per year paid to agents, consultants and other intermediaries for transactions with public bodies or state enterprises, *whether lawful or unlawful.* It calls on all governments to adopt comparable mandatory disclosure rules as a part of their domestic law.

The principle of the ICC code is that a known duty to disclose all agents' commissions will deter intermediaries from soliciting large illicit payments. Presumably, knowledge that the intermediary was receiving a large commission, even a presumptively lawful one, would lead to official inquiries that neither the intermediary nor his official principal could afford. If the duty of disclosure does not deter the solicitation, it is still likely to deter the foreign firm from succumbing. If it does neither, the required disclosure will at least facilitate after-the-fact detection of any crime. On the other hand, disclosure should not deter the solicitation or payment of lawful commissions to legitimate agents and consultants for bona fide business purposes. Disclosure should therefore provide an effective screen between proper and improper behavior.

The code does more than require the prophylaxis of disclosure. It also provides for an ICC Commission to receive and investigate complaints. In this way, it channels the force of competition away from paying a bribe to win a contract, and toward the making of complaints that may prevent and detect bribery attempts by competitors.

The Shawcross committee's work has been strongly supported by the U.S. firms that make up the U.S. Council of the ICC, and by committee members from some third world and smaller European states. But in some parts of Western Europe, the reception has been somewhere between cool and hostile. ICC approval was obtained by a narrow margin, at the cost of deferring the work of the new ICC investigatory commission until a further revision of its procedural rules is completed. Some European multinational executives have bona fide objections to the principle of disclosure, ranging from legal concern about self-incrimination to the embarrassment of legitimate agents. For others, the objection is more fundamental—disclosure would put a stop to a "necessary" business practice. Consider the following reaction to the original U.S. disclosures, which appeared in a French business magazine in 1976:

"It has become dangerous to do business with certain American multinational corporations especially to the extent that 'sensitive' matters are involved. The American press and Congress—which are often kept well informed by Soviet diplomats—seem intent upon revealing bit by bit the basis of certain transactions. Inasmuch as the 'contracts of the century' are increasing in number and are (nearly) always accompanied by substantial gratuities, the risks of such disclosure are far from negligible. . . . Thus, the somewhat cynical observation of one French industrialist: 'the label "Made in France" offers an added guarantee.' "

What have national governments done to stop illicit payments? As noted above, bribery of government officials is already illegal under the criminal laws of most nations. But the essence of bribery is secrecy, and both the payer and the payee have every incentive to keep the secret. Bribery rarely comes to

light in the absence of laws requiring disclosure, such as the U.S. securities laws. The United States has no rival in the breadth of its disclosure laws. But since the recent U.S. disclosures, Iran and Saudi Arabia have adopted regulations that require firms bidding on state contracts to file affidavits disclosing all commissions to agents and consultants, whether lawful or unlawful. Algeria absolutely forbids commissions to agents who help to obtain any state contracts, and requires affidavits that none have been paid. Iran and Saudi Arabia have similar rules limited to military contracts. However, whether these nations can obtain truthful affidavits from any but U.S. firms—who are impelled toward truth by the need to comply with U.S. laws—is still an open question.

The United States has no need for additional laws to prevent illicit payments abroad by U.S. firms, because the SEC disclosure rules have already done the job. Based on such disclosures, a number of criminal investigations have been initiated, either to uncover illicit payments that were illegally deducted for tax purposes under existing tax law, or on the novel and highly questionable theory that such payments violate the long-standing statutes that forbid fraud in interstate or foreign commerce by mail or wire. A number of stockholders' suits have also been launched against the offending executives and directors to recover the amounts paid and other damages to the corporation.

But in the American tradition of *always* passing a new law when a public scandal occurs, Congress has passed a new law anyway, which for the first time makes it a U.S. crime for any U.S.-controlled firm or U.S. citizen to make an illicit payment to an official of a *foreign* government for the purpose of obtaining a contract or other favorable official action. That anyone could be successfully prosecuted under such a law seems most unlikely, especially since a defense of extortion or coercion is allowed. The defendant would be entitled to present the testimony of the intermediary or official to whom the prosecutor claims the payment was made, either to disprove this claim or to establish the defense of extortion or coercion. But since the defendant could not summon the intermediary or official as a witness except in

the unlikely role of a volunteer, the defendant probably could not obtain a constitutionally fair trial, and the court might well have to dismiss the charges.

To date, the home governments of multinational firms have adopted no new laws or regulations to prevent their firms from making illicit payments abroad. Indeed, their present regulations and practices positively encourage such payments. In Germany, Britain and France, payments of bribes abroad to obtain business are still deductible for income tax purposes. In these and other industrial democracies, such payments have been disclosed to and financed by the state export credit agencies that promote foreign trade. In Canada, a government-owned company has itself admitted to paying bribes to win a nuclear power contract in Argentina. It is worthy of note that while management control of British Leyland is now held by the British government, it has done nothing as of this writing to admit, disclose or correct the practice of foreign bribery that Leyland's recently ousted chairman not only admitted but defended. It remains to be seen whether the new ICC code, which includes strong recommendations that all governments enact prophylactic laws, will have any effect on the headquarters governments of the multinationals who supported those recommendations.

At the international level, the government record to date is somewhat better, but not much. The OECD guidelines state that firms "should not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;" and that such firms should "unless legally permissible, not make contributions to candidates for public office or to political parties or other political organizations." An encouraging communiqué also came out of the Downing Street economic summit conference in May 1977. There, President Carter's initiative led to a statement by the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States denouncing illicit multinational payments and committing all these home state governments to join in measures that would halt the

practice. A related U.S. initiative in the UN Economic and Social Council (ECOSOC)—expressly supported by the new ICC code—has led to a working draft prepared without commitment by a committee consisting of representatives of 19 nations. While it contains widely different versions of many key clauses, this draft recommends criminalization in both headquarters and host countries as well as a reporting requirement similar to that adopted by the ICC. The United States had received little support for this initiative from its Downing Street partners until, as these words were written, news was received of an encouraging French proposal that every nation agree to punish criminally any payment of a bribe by one of its nationals, or within its territory, to an official of a foreign state. It is unclear what, if anything, will result from all these efforts.

Independence from National Control

We noted earlier that a certain degree of independence from national control is perhaps the most valuable attribute of the multinational firm. That independence, of course, has never been unlimited. Multinational corporations are quite sensitive to the desires of the host countries in which they operate, and most host governments exercise a considerable degree of formal or informal control over those operations. Few multinational firms would think of initiating or acquiring a business before soliciting the views of the host government. Indeed, many governments require formal permission before the multinational firm may enter. Thereafter, the host government's power to dispense import licenses, tax concessions and financial assistance, and to control remittances of earnings, provides a wide range of tools to induce conformity with national economic policies.

The social welfare laws of many countries impose further controls. The layoff of temporarily surplus employees without large termination payments—the hallmark of the purer capitalist economies like the United States—has virtually been legislated out of existence in other parts of the industrial world. For any firm to reduce its work force in Europe or Japan is extremely difficult and costly. Reductions are subject to legal as well as eco-

nomic and moral restraints. Even firms that go out of business face heavy termination costs. In a recent case, the government of Belgium has sought to compel the American parent of a distressed and shut-down subsidiary in Belgium to honor the subsidiary's unmet termination obligations to its workers.

At the international level, the OECD's voluntary guidelines call upon all multinational enterprises to "take fully into account established general policy objectives of the member countries in which they operate," giving "due consideration to those countries' aims and priorities with regard to economic and social progress . . ." Most multinational firms, in their own self-interest, make a conscientious effort to do so. Where the cost penalties, if any, are bearable, they go to considerable lengths to contribute to the internal development of their host nation. Thus, they manufacture, conduct research, and assemble the final product in every major market in which they operate, and export from those markets to other markets—including their home countries—whenever this is feasible.

Multinational firms also take into account the national political and economic interests of their home countries, in part because of national empathy, and in part because of their natural motivation to stay on the right side of the one government above all that can do most to foster or harm their well-being. Moreover, many home governments exercise a variety of direct and indirect controls over the activities of their multinational firms. Most European countries and Japan exercise exchange control over the investments of their multinationals abroad, and also exercise management control over the investments by firms that the state itself wholly or partly owns. Even the United States has occasionally imposed such exchange controls within the last decade.

Interestingly, the home government's arsenal of controls is not always used to prevent the "export of jobs." Some home governments do recognize that broader national objectives are sometimes better served by permitting an occasional export of jobs—even to an equally industrialized nation. For example, Volkswagen recently decided that the economics of comparative

advantage favored the construction of an assembly plant in the United States to serve this important market. It made that move despite the opposition of its politically powerful labor unions and their representatives on its supervisory board, and despite the fact that the West German federal and state governments own the controlling blocks of its shares. Unhappily, the ability of Volkswagen to make this decision does not signify that the millennium of economic enlightment has arrived in other nations. No other modern government, including the United States, has remained as constant in its loyalty to the principles of comparative economic advantage and free markets as the Federal Republic of Germany.

Home country control is also employed effectively for domestic political as well as economic purposes. From the early days of the cold war, the United States has effectively prohibited investments and transfers of technology, as well as certain types of trade itself, with the Soviet bloc nations of Eastern Europe, and with China and Cuba. The Western European governments were our reluctant partners in this policy for many years. Similarly, all home countries have encouraged their firms to make politically advantageous investments abroad by elaborate systems of guarantees against political, currency exchange and even business risks. On the whole, home countries play a major role, perhaps an excessive one, in channeling the flow and direction of multinational investments.

International efforts to control investment abroad are still in their infancy. Most notable are the efforts of the NATO countries to adopt joint restrictions on trade and investment with the Soviet bloc, the UN economic sanctions against Rhodesia, and the recent decision by EEC members to adopt joint guidelines concerning the racial and other practices of their firms doing business in South Africa. But common policies that would encourage free investment wherever comparative economic advantage may lead is another idea whose time has not yet arrived.

5

Toward a Regime for Transnational Investment

All studies of transnational investment conclude with the author's own particular nostrum. By now the reader may have deduced that this student finds more to praise than to condemn in the present activities of transnational firms, and more worth preserving than eliminating. But some tendencies of multinational firms do need to be curbed by home and host governments, just as some efforts of headquarters and host governments to restrict or attract investments by such firms need to be curbed in the general interest of an efficient and growing world economy.

This chapter suggests that the time may be ripe for the leading industrial democracies to develop binding international rules for transnational investment, and to create new international institutions to administer those rules. Tax allocations and incentives, the regulation of financial reporting and investment markets, restrictions on entry and nationalization, antitrust policy, illicit payments to foreign officials and environmental restraints are among the subjects that international rules might usefully cover.

Despite recent setbacks and an alarming current revival of

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protectionist sentiment, the ideal of a world market for trade and investment is now nearer to reality than ever before. Much of this progress is attributable to the development of international rules and institutions in the fields of trade, exchange rates, and development lending. Imperfect as GATT and the Bretton Woods agreements have proven to be, their very existence has contributed materially to the interdependence, efficiency and growth of the world economy. The somewhat creaky institutions they created—together with the structural repairs made in the past few years—provide a foundation for the reforms that will permit further progress to be achieved.

But as we have seen, we have no such international rules or institutions for transnational investment and the conduct and treatment of transnational enterprise. True, we do have an assortment of bilateral agreements between nations governing the tax and entry treatment of one another's citizens and firms. But these agreements are as outdated as their name, "treaties of friendship, commerce and navigation," suggests. The Treaty of Rome does provide a modern and multilateral framework for transnational investment and enterprise within the EEC, and this has been a major factor in the growth of the Common Market's economy over the last decade. But for the industrialized nations as a whole, we have nothing beyond the voluntary principles recently adopted by the OECD. For the world at large, we have nothing more promising on the horizon than the code of conduct being developed by the UN Commission on Transnational Corporations. Unfortunately, this effort is only beginning to narrow the wide differences in perceptions between the developed and developing nations, and even this beginning has been impeded by the confrontation tactics of some third world participants.

Before GATT itself was created, a single international organization with its own rules for both trade and investment, the International Trade Organization (ITO), had been conceived as a third leg of a World Bank-IMF-ITO tripod to support the postwar international economic order. But opposition in Congress made the ITO stillborn, and GATT emerged instead.

Given the present lack of consensus between the industrialized and the developing nations as to the role of multinational investment, a worldwide institution for the governance of international investment is likely to elude us for many decades to come.

George W. Ball, whose fertile mind and unceasing advocacy contributed enormously to the creation of the European Coal and Steel Community, the European Court of Justice and the Common Market, recently proposed that such a body be created under UN auspices. This body would replace national governments as the incorporating authority for multinational firms, and would write and administer the rules under which such firms would conduct their affairs. There is much to be said for this concept. But at the present adolescent stage of international government, no foreign-office or boardroom homburgs, in Mr. Ball's own phrase, have yet been tossed into the air in support of any such idea.

Given the wide differences in perceptions between the industrial nations and the rest of the world as to the benefits of transnational investment, it seems most unlikely that the UN Commission or concepts like Mr. Ball's can achieve any consensus in the near future. But within the industrial nations at least, the common need for international rules and institutions for investment is now more widely appreciated. As we have noted, enterprises—both private and state owned—with establishments in more than one country today account for a substantial percentage of the industrial nations' GDP. Their headquarters are becoming broadly dispersed: of the 50 largest multinationals, less than half have their home base in the United States. The United States economy is not the only one interested in fostering its investments and business operations abroad; that interest is now widely shared by many of the major trading nations.

This "outward" concern is paralleled by two "inward" concerns that characterize competing industrialized national economies, each intent on expanding the employment of its own citizens and resources. One is that foreign capital and enterprise managed from abroad will be less responsive than domestic

capital and enterprise to domestic economic and social interests, and more responsive to changing opportunities for greater efficiencies and returns in other parts of the world. The other concern is that other national economies will tempt domestic capital and enterprise to transfer their resources and activities abroad by offering "unfair" taxation and other incentives that the domestic economy does not provide.

These developing concerns in the industrialized nations over the "export of jobs" are of course protectionist to some extent, but transnational capital and enterprise do act in ways that, while encouraged by one industrialized national economy, can seem highly unfair to another. The need to work out some international definitions of what is fair and what is unfair now seems evident to many.

Toward a Regime for Multinationals

There are a number of aspects of multinational operations for which the industrial nations might now be able to agree on international rules—and on creating international institutions to interpret them.

Taxation. Here we might consider common rules:

(a) for allocating costs and income of transnational enterprises among the countries in which they operate;

(b) for deciding which nation (or both) can tax the income of foreign individuals and companies (including subsidiaries of multinationals) resident in its territory;

(c) as to deferral policies and tax credits for taxes paid to another country;

(d) as to the line between fair and unfair tax incentives designed to attract capital and enterprises from abroad; and

(e) as to the impermissibility of tax havens in countries with no other significant economic ties to the firms that seek their shelter.

Financial reporting and investment markets. Here we might consider the development of international rules as to:

(a) minimum standards of financial reporting by publicly held private firms and state enterprises;

(b) reporting by multinational firms of allocations of costs and profits among the countries in which they operate;

(c) disclosure requirements for the public marketing of securities, including government issues; and

(d) the reciprocal listing of major securities on all world securities markets.

Entry and Nationalization. Common rules with respect to conditions of entry and nationalization could also be developed. These rules might include a ban on any required percentage of domestic private or public ownership, except in the natural resource extraction, communications and defense industries. They might also ban the nationalization of foreign-owned shares in enterprises, except after reasonable advance notice and upon prompt payment of just compensation in convertible funds.

Antitrust Policy and Enforcement. A common rule as to substantive antitrust requirements might include a ban on transnational cartels involving private or state enterprises. Even more important, we might adopt international rules as to national antitrust jurisdiction, perhaps including a rule that, where practicable, relief against practices significantly affecting the commerce of more than one country would be jointly designed by the affected governments. These jointly designed rules would be enforced by each government against the firms and individuals residing in its territory. They would not be unilaterally enforced by any one country against individuals and firms residing abroad. The group of twenty "eminent persons" who prepared an agenda for the UN Commission on Transnational Corporations has advanced proposals along similar lines.

Illicit Payments. In the field of illicit payments to foreign officials, we have readily available models in the ICC code and the Carter initiative at the 1977 Downing Street summit, described in the preceding chapter. Accordingly, it should be feasible to develop common rules as to the reporting and disclosure of all significant commissions and similar payments by business firms to agents, intermediaries or officials to induce favorable government actions or to obtain contracts from states or state enterprises. Similar rules to deter kickbacks in major

private transactions, and rules banning political contributions by foreign nationals and enterprises controlled from abroad, might also be designed.

Environment. Common environmental standards for particular sectors of industry that compete with one another throughout the world might also be amenable to international rule-making. At the very least, we might try to agree on minimum standards of air and water quality control for major industrial installations. These standards could be designed to minimize international competition to attract plant sites based on differences among existing environmental standards.

The above list of topics for consideration may be far too ambitious for a first round of negotiations. But at least it gives some idea of the accumulating agenda of transnational investment issues that are ripe for the development of international rules.

We also need to create new institutions to interpret and administer these rules. The creativity of the postwar climate that conceived and built the World Bank, the IMF, GATT and the EEC seems to have lost its potency. It is a remarkable and deplorable fact that apart from a few international finance committees like the Group of Ten that depend entirely on voluntarism and unanimity, no important new international economic institution has been created by the industrial democracies since the Treaty of Rome over 20 years ago.

Surely we have the genius to devise effective institutions to administer a regime for transnational investment among the industrial democracies. These institutions might include a commission to administer the rules and issue interpretive regulations and a court to adjudicate charges of violations brought before it by the commission, by any member nation, or by any affected investor sponsored by a member nation. The EEC Commission and the European Court of Justice provide obvious parallels and two decades of experience to draw upon.

Is a Consensus Possible?

One may fairly question whether there is enough of a consensus, even among the OECD nations, to formulate any set

of rules or a structure to interpret and enforce them. Perhaps we are able to muster a sufficient consensus only in the face of some great economic crisis like the one that loomed during and after World War II and led to the Bretton Woods and GATT agreements and to the formation of the Common Market. But there are many who believe a similar crisis looms today—the stagflation that is now a chronic ailment of the industrial democracies.

Stagflation threatens the continued economic growth that may be indispensable to sustain democracy as a viable system of government for a modern industrial society. Lack of sustained growth could have the most profound political consequences for us all. Stagflation is a phenomenon we do not yet fully understand, and to be sure, an international regime for multinational investment would be far from a complete cure. But it would be a step toward maximizing the power of the greatest engine of international economic growth yet discovered, and toward channeling that power into more constructive and responsible forms.

If the effort to launch such a project seems worthwhile, one must decide how and where to begin. The United States, as the leading national and transnational economy, should be the one to take the initiative. Clearly, the UN as it is now functioning is not the place to begin. A case could be made for beginning with GATT, which has already fashioned similar rules for international trade and has its institutions and bureaucracy already in place. But even GATT seems too large, too diverse and too preoccupied with "trade" issues to undertake the initial effort. Moreover, the basic enforcing principle of GATT is to require nations that violate its trade rules to make compensation in some other aspect of their trade with the injured trading partners—a sanction that would be difficult to adapt to violations of rules of international investment.

A better choice for the initial negotiating forum seems to be the OECD. The OECD includes all the major industrial nations of the non-Communist world. It has already made a start on some broad voluntary principles in this field. It has a fairly high potential for reaching a consensus on the key issues. An OECD-

wide agreement could be open to adherence by any nation. Moreover, the OECD nations could announce at the outset that they would be prepared to consider the views of all other nations before finalizing the agreement, and to make appropriate arrangements for modifying and enlarging the agreement to include all willing signatories of an eventual UN code of conduct for transnational corporations. At the very least, the OECD could develop a working draft document for consideration by a forum, such as the UN Group of 77, that would include both the industrialized and the less-developed members of the world economic community.

As with any problem that requires international cooperation to resolve, a successful outcome will depend upon how clearly the United States and the other industrial democracies can identify their shared perceptions and values, and how capably and energetically we and others of our persuasion can advocate our common views.

Glossary

Autarky. National economic self-sufficiency.

Bilateral. Applied to a negotiation or agreement involving two parties.

Bretton Woods Agreements. Agreements reached at Bretton Woods, N.H. in 1944 by the leading industrial countries to form the World Bank and the International Monetary Fund (see below).

Cartel. A combination of sellers of similar goods or services who agree to limit their competition by regulating output, fixing prices, allocating markets, etc. OPEC is the most important cartel in recent times.

Economy of Scale. A reduction in production cost per unit of output achieved by increasing the size of operations.

Equity. A risk interest or ownership right in property, such as the common stock of a corporation.

European Court of Justice. An organ of the European Communities (see EEC below) which has the power to decide disputes over the application of the treaties governing the Communities.

European Economic Community (EEC). Popularly called the Common Market, it is the main element in the European Communities. Its members are France, Federal Republic of Germany, Italy, Belgium, the Netherlands, Luxembourg, Britain, Denmark and Ireland. It is based on the Treaty of Rome signed in 1958.

Exchange Balance. Another term for the balance of payments, which is the difference between what a country earns from exports, foreign investment, etc., and what it spends abroad for imports, interest, dividends to foreign investors, etc.

General Agreement on Tariffs and Trade (GATT). Established 1948, originally as an interim measure pending creation of a more comprehensive International Trade Organization (ITO). The ITO charter has not been ratified, and GATT remains as a negotiating mechanism for trade rules accepted by countries that are responsible

for most of the world's trade. By 1975 there were 83 contracting parties, with another 27 participating under special arrangements.

Gross Domestic Product (GDP). The money value of all goods and services produced within a country, excluding net income from abroad. (Gross national product (GNP) includes net income from abroad.)

Group of 77. A caucus of delegates from less-developed countries (LDC's), originally 77 in number, who first met at the 1964 UN Conference on Trade and Development. Now numbering over 110 nations, the group coordinates LDC views and proposals, especially in UN meetings, on economic and social questions.

Group of Ten. Representatives of the finance ministries and central banks (or leading private banks) of the U.S., Britain, France, West Germany, Belgium, the Netherlands, Italy, Sweden, Canada and Japan. Their periodic closed meetings in Switzerland play a key part in the functioning of the international monetary system.

Headquarters. In a multinational firm, the headquarters company is the parent company which controls subsidiary companies in various countries. The headquarters country is the country in which the headquarters company is located.

Host. Applied to any country in which a foreign multinational corporation has a subsidiary, or to that country's government.

International Monetary Fund (IMF). International agency closely associated with the World Bank (see below). Its main task is to keep order among exchange rates of national currencies used in international trade and investment.

ITO. International Trade Organization (see General Agreement on Tariffs and Trade).

Oligopoly. A market situation where sellers are so few that the supply offered by any one of them materially affects the market price, and where each one is able to measure, with a fair degree of accuracy, the effect of his price and production decisions upon similar decisions by his competitors.

OPEC. Organization of Petroleum Exporting Countries. Created in 1960 by Arab petroleum exporting countries and Venezuela. Beginning in 1973, its 13 members joined in drastic and coordinated increases in international crude oil prices.

Securities and Exchange Commission. An independent, quasijudicial agency of the United States created under the authority of the Securities and Exchange Act of 1934. Its primary purposes are to require full disclosure of facts material to the purchase and sale of securities, and to protect the interests of the public and investors against malpractice in the securities market.

South Sea Bubble. Popular name in England for the speculation in the South Sea Company in 1711-20. Many fraudulent schemes were associated with it, and when the bubble burst, many banks failed, stocks fell and thousands were ruined.

Transfer Price. The price recorded on a company's books when goods or services are sold by one of its subsidiaries to another.

Transnational. Synonym for multinational.

Treaty of Rome. Signed in Rome in 1958 by the original Six members of the European Communities, it established the European Economic Community (see above) and the European Atomic Energy Community.

World Bank. Popular term for International Bank for Reconstruction and Development (IBRD). The largest international agency devoted to financing economic development; disburses over $2.5 billion annually in loans. Founded 1945 together with, and closely associated with, the International Monetary Fund (see above). Unlike other specialized agencies of the UN, the IBRD and IMF make decisions by weighted voting; thus the nations supplying most of the capital have a preponderant voice. The Soviet Union and the People's Republic of China have not sought to become members.

Zaibatsu. A system of powerful family-controlled commercial and industrial combines which dominated the economy of Japan until their dissolution after World War II. The successor companies after the breakup now exercise almost as much market power as the original units.

Talking It Over

A Note for Students and Discussion Groups

This pamphlet, like its predecessors in the HEADLINE Series, is published for every serious reader, specialized or not, who takes an interest in the subject. Many of our readers will be in classrooms, seminars or community discussion groups. Particularly with them in mind, we present below some discussion questions—suggested as a starting point only—and references for further reading.

Discussion Questions

Many of the varied complaints against multinational firms, the author says, boil down to the assertion that they "behave too multinationally" to suit the interests of the nations in which they operate. Do you agree or disagree with his view that this behavior is beneficial, not harmful?

What benefits, and what drawbacks, would you say our economy derives from foreign companies in the United States? Do you think it is wise to exclude foreign firms from certain fields of business such as transportation, mining, etc.?

In chapter 3, the author argues that the multinational firm today provides the best "yardstick of competitive rationality" in countries where state-owned firms dominate major industries. What does he mean by this? Do you agree or not?

Would you favor or oppose a law restricting the right of American-based multinationals to "export American jobs" by moving some of their U.S. industrial operations abroad? Explain your view.

The author proposes in chapter 5 that the industrial nations agree on "international rules" for multinationals and on institutions to administer the rules. What arguments can you think of for and against this proposal?

The preoccupation of many new third-world nations with achieving control over business firms, according to the author, is explained by the fact that they have not yet experienced "the disillusions of excessive nationalism." Historically, how would you explain their attitudes on this subject?

In general, how far do you think governments should go in regulating, owning or controlling business enterprise? What should be the aims of government intervention in this field? To what extent do you think government should rely on the competitive marketplace to produce economic progress?

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The multinational firm tends to think and act on global rather than national premises. Complaints against it are variations on one essential theme: that it is not nationalistic enough.

Multinational investment, moving in and out of this country, performs a valuable function in maintaining efficiency and profit opportunities to increase our employment and growth.

The time may be ripe to develop binding international rules for transnational investment. The ideal of a world market for trade and investment is now nearer to reality than ever before.

Senator MATHIAS. We are now in the final stages, the jogging stages, of a vote, and so I am about to jog. However, I will ask Mr. Shenefield, Mr. Joelson, and Mr. Rosenthal to come to the table. I understand Senator Specter is on the way, will be here in just a moment, so we will not take a recess but we will take what is being called for in Paris today, a pause.

[Brief recess.]

Senator SPECTER [acting chairman]. Senator Mathias has asked me to resume the hearings in light of the time pressures which I know that you gentlemen are under. I understand Mr. Shenefield has to depart soon, and as you know, Senator Mathias went to cast a vote. Therefore, we would be pleased to hear from you, Mr. Shenefield.

STATEMENT OF JOHN H. SHENEFIELD, ESQ., MILBANK, TWEED, HADLEY & McCLOY, WASHINGTON, D.C.

Mr. SHENEFIELD. Thank you, Senator Specter.

Senator SPECTER. The practice, as you well know, is to summarize your testimony, trying to leave as much time as possible for questions.

Mr. SHENEFIELD. I assure you I shall be quite brief.

First, I would like to lay on the record the grounds upon which I am happy to support S. 432. I think, after considerable reflection, that the case has been made out that at least some people are confused about this subject. It is unclear the extent to which U.S. antitrust law applies to international transactions.

If we are heading into a process—and I hope we are—pursuant to which internationalization of this problem will take place, the better thereby to achieve a solution, it does seem to me crucial for us to develop a consensus in this country about what we believe the state of the law to be. I would hope, therefore, that the Commission could make a useful contribution on that score.

Second, there are important issues of national policy to be resolved before we make decisions about how far we wish to revise the antitrust laws whether we wish to sacrifice competition domestically in order to gain it internationally, if that is necessary; whether our antitrust laws should be applied where there is no advantage to American consumers. I would hope that this Commission could develop a consensus on the relevant economic policy involved.

Third, there is no question but what foreign governments and, most painfully, those of our closest allies, have been aggrieved by their perception that as a country we have challenged too aggressively under the antitrust laws. I would hope that the Commission could develop a consensus that reconciles, on the one hand, our determination to protect our own economy and our own consumers and our own businesses, and on the other hand a sensitivity to the sovereign interests of other countries, and develop a basis and principles upon which the inevitable disputes—whatever the ultimate position that we take—can be solved.

I do not share several grounds upon which this Commission has been justified and was justified this morning. I do not see a major link between antitrust law enforcement and our export perform-

ance. To me, that is an unclear nexus. I would not seek to justify this Commission on those grounds.

Second, I do not think it is fair to say that antitrust analysis has been unable to adjust to the international realities of the world in which we live, that is to say, has not been able to take into account international competition where that was relevant. That is sometimes said; I do not think it is accurate.

I do not see, as some people have suggested, the antitrust laws as a basis upon which foreign competition should be barred from this country. Indeed, Senator Mathias said quite the reverse. If the Commission spends much time going down those roads, it will have been deflected from far more important questions.

My testimony points to four or five specific and mechanical improvements in the nature of the Commission, the way in which it is run, the budget, and the staff, that I draw from my own experience as Chairman of the National Commission to Review Antitrust Laws and Procedures. The only one of those that I would dwell on here orally is the need to refer specifically in the list of matters to be examined to the question of the treble-damage remedy.

It does seem to me that the treble-damage remedy is probably the single most difficult part of our antitrust law enforcement scheme for foreign governments to deal with. I think in fairness that whole remedy does need revisiting and, by altering the statute, I would require the Commission to examine it.

In summary, Mr. Chairman, I see this Commission as an opportunity, an opportunity to dispel myths, an opportunity to demonstrate a national consensus on important points of our national economic policy, and, finally, an opportunity to regain the leadership in a policy fight that we have been known for around the world, and that is the policy fight for competition on a worldwide basis. That is a very long process. I do not want to see this country abandon that leadership role. I would like to think of this Commission as a fitting and effective way to begin again.

Thank you, Mr. Chairman.

Senator SPECTER. Mr. Shenefield, I believe that you had opposed similar legislation in the past?

Mr. SHENEFIELD. Mr. Chairman, when I was head of the Antitrust Division this bill came up, hard on the heels of the National Commission to Review Antitrust Laws and Procedures.

I was unwilling at that time to support the bill because I expected that it would have the same relationship to the Division that the other Commission did, which is that we staffed it virtually entirely out of the Division. It took an enormous amount of time and resources to run the Commission. Until I was assured that there were other ways to get the Commission staffed and managed, I was not willing to support it, in addition to which——

Senator SPECTER. What are those other ways?

Mr. SHENEFIELD. Well, I take it a budget will be provided by the Congress and staff, independent staff, outside the Government can be hired. All of that seems to me absolutely essential, as my testimony suggests.

Senator SPECTER. If it were to draw heavily on the Justice Department, would you maintain your bold opposition even though you are no longer there or would it not be so important?

Mr. SHENEFIELD. My concern would be less direct. On the other hand, I am not clear on what the Division's budget is at this point. They may have suffered substantial budget reductions, in which case the problem would be exacerbated rather than moderated or solved.

The other point is that at the time the bill originally came up, it came up in the form of a crusade to make American firms more competitive abroad, the direct implication being that antitrust enforcement should in some wise be restrained. That did not seem to me, as it still does not, a very persuasive rationale. On the other hand I have, on thinking it through a little bit, seen some opportunities, affirmative opportunities that I think the Commission can live up to.

Senator SPECTER. When you say that there is no significant impact, as you see it, or that changing the antitrust laws would not have any effect on our exports, how can that be if foreign industrial operations or manufacturers are not limited by the antitrust laws whereas our companies are? Does that not have to have some effect on our companies' abilities to compete with foreigners in the international field?

Mr. SHENEFIELD. I think the central answer to your question—there are a number—but I think the central answer is that the antitrust laws, properly applied, properly construed, do not prohibit what it is necessary for our companies to do now to compete abroad. Now the reference to——

Senator SPECTER. Do you disagree with what Senator Javits was saying, essentially?

Mr. SHENEFIELD. I am afraid I do. On the other hand, he made the point very well that the perception among American businessmen that there is that problem is itself a disincentive. I would hope that this Commission, by declaring the relevant principles for the benefit of all, would do a lot to wipe out what I believe is an erroneous conception.

Senator SPECTER. Therefore, we really do not need a staff. All we have to have is the Commission; they make the declaration; the perception is gone and the impediment which now exists as a result of misperception would be corrected?

Mr. SHENEFIELD. That would be even less expensive. [Laughter.]

Senator SPECTER. At any rate, if the only cause is a misperception that American companies think their activities are limited by our antitrust laws, does that have an effect on limiting our exports? They are simply afraid to do it, even though they should not be?

Mr. SHENEFIELD. I think that there is the combined result of greater conservatism in counseling by lawyers than is necessary; a legitimate fear of the treble damage remedy which courts have allowed on occasion—not frequently but on occasion—to be far more far-reaching than is justified; the widespread view which I think is a misperception—that is my own view—that the antitrust laws would prevent certain desirable activities. All of those things together have combined to restrain firms from doing things they probably could have done quite lawfully and certainly should do as a matter of their own business self-interest.

Senator SPECTER. Well, when you say that the laws do not restrain them from those activities, are you absolute by certain or are you talking abcut your judgment, which might be susceptible to challenge by some future head of the Antitrust Division?

Mr. SHENEFIELD. Senator Specter, I would like to think it was possible to live in a world of absolute certainty. I have never found an area of the law in which we were able to reach it. I do not think this area of the law is all that uncertain. I have not seen wide variations of opinion among lawyers on most of the relevant principles.

There are one or two points where I think it is possible to make defensible arguments that there is a split of authority but not on any major point and not on most of the kinds of activities that business firms are willing to engage in.

Senator SPECTER. Thank you, Mr. Chairman.

Senator MATHIAS [acting chairman]. Mr. Shenefield, wouldn't it be a devastating thing for lawyers if we ever reached a time at which the law was fixed at a state of certainty?

Mr. SHENEFIELD. It would be the most revolting development that I can possibly conceive. [Laughter.]

Senator MATHIAS. I do not say that with any sense of complacency, sitting here on the bench. I look forward to the day when I may join you at the witness table and be out scrambling.

Mr. SHENEFIELD. We would be honored.

Senator MATHIAS. I take it that your view on this issue is somewhat like my own. I do not come into this with any preconceived ideas as to what we ought to do legislatively following the result of this commission activity but that we really try to settle in our own minds, as I said to Mr. Baxter, not just what is the state of the law but what is the state of the facts as results from the application of the law in the contemporary climate.

Mr. SHENEFIELD. I do agree with that, and it does seem to me that your point to Mr. Baxter was exceedingly well taken. That is to say, we are probably headed in the direction of some internationalization of the resolution of this series of disputes. It seems to me that before we can sensibly begin that process, we ought to have clearly in our own minds what we want to gain, what we can afford to give up, what we think the state of the world is.

Senator MATHIAS. Well, that I think is valuable and it seems to me that it is going to be more important in the years ahead. If as Senator Javits said we need to concentrate on an expansion of trade, and I think that is almost self-evident today, then our international economic contacts are going to proliferate. We are going to have more points of disagreement because simply there will be more contacts, and we may in fact be able to head off that kind of problem.

I do not want to hold up Mr. Rosenthal.

Mr. SHENEFIELD. Mr. Chairman, while you were out of the room they did me the honor of allowing me to go first, inasmuch as I would like to get away to get to another speech that I have to make early this afternoon, so they have not delivered their formal testimony yet.

Senator MATHIAS. Well, we will be happy to hear from them at this point.

We appreciate very much your being here and your participation. Thank you very much.

Mr. Rosenthal?

STATEMENT OF DOUGLAS E. ROSENTHAL, ESQ., SUTHERLAND, ASBILL & BRENNAN, WASHINGTON, D.C., REPRESENTING THE CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. ROSENTHAL. Mr. Chairman, thank you. I am here speaking on behalf of the Chamber of Commerce of the United States and on my own right as somebody who has followed this issue with considerable interest over the years.

I think it is important to point out to you—I am sure you are aware of it—that this is the first time that the chamber of commerce has addressed itself before this distinguished committee on this important issue.

Senator MATHIAS. Let me just interrupt you to say I am very well aware of it because I have been wondering where they were in some of the previous forays.

Mr. ROSENTHAL. I think that I have observed as you have that over the years, as this legislation has been considered and deliberated upon and as a very long list of very distinguished people have appeared before this committee, there has been a heavy representation from the academic community, there has been a heavy representation from the international legal community and the antitrust community, but there has not been a strong representation by the businessmen.

The burden of my prepared testimony, which you have before you, is that there are serious problems here for the U.S. businessman, that the U.S. business community is increasingly recognizing that there are serious problems, and that they believe that a commission of the kind you have been working for would be constructive. It would be constructive in supplementing and assisting the executive branch in the formulation of its policy; would be constructive in supplementing and assisting the courts in their efforts to clarify the legal rules; would be important—and this was a point that was, I think, not fully addressed by the earlier distinguished speakers—would provide a forum and an opportunity for hearing from foreign businessmen and foreign governments about precisely what their concerns are, which would be missing in a bilateral arrangement between nations.

Perhaps in having the chamber of commerce speak on this issue today, perhaps by dramatizing that this is a problem for businessmen, that this is a problem for people out in the world, we can deflect some of the implication of Mr. Baxter's testimony that this is really a problem between governments and that governments, in closed sessions, can work these problems out by a series of private negotiations. The point has been very well made and it is absolutely important, that in our political system, quite properly, we need the Congress to play a direct role in working out these international agreements.

Of course, Mr. Baxter is right that ultimate resolution of these problems cannot be done unilaterally in the United States. I have not heard anybody this morning or in any past session suggest that

this is a problem which can be resolved unilaterally within the United States.

Senator MATHIAS. Certainly I think no member of this committee would take that view.

Mr. ROSENTHAL. Absolutely right. I think the important point as well, Mr. Chairman, is that the businessmen—the ones that Senator Javits was speaking so eloquently about, who need the opportunity to compete, who need the opportunity to be told what the rules are so that they can go ahead and get down to business—they need an opportunity as well to speak.

From my experience in the Government, where I had the honor and the privilege of working for my friend John Shenefield, I found that so often on these issues it was impossible to formulate a comprehensive or an innovative executive branch policy for the United States in bilateral discussions. What is needed is the building of an informed public opinion on this issue, that is, a joint exploration of these problems by the Congress, by the business community, by the legal community.

We are beginning, it seems to me, to put this together. It is refreshing to me—as it no doubt is to you, who have lived with this longer than I have, but I have followed this issue for the past 4 years—it is refreshing to hear members of this administration sitting at this table and frankly and candidly and in some detail speaking about the range and the specificity of these problems.

As you remember, in earlier days the Government tried to say, "We can handle this ourselves. We do not really want to come into an open forum and discuss these problems." We have made progress there. We have made progress with the American Bar Association endorsing strongly the concept behind your legislation.

Now there are points of disagreement that have been expressed today, but I very much agree with Sherman Unger, and Davis Robinson, and the others who have said that there is much more here on which there is agreement than on which there is disagreement. As you will note from the testimony that the chamber has submitted, the chamber—contrary to my esteemed colleague, Kingman Brewster—feels that it is possible and in fact desirable to broaden a bit, not excessively but a bit, the focus of the Commission's work if we are truly to lay a foundation for long-term bilateral and multilateral resolution of these problems.

As I in the past 2 years—in my work in the chamber and in the American Bar Assocation—have looked at the problems that raise the existing conflicts for the business community here and abroad, it seems to me that there are certain common themes which transcend particular substantive areas of law. It is not necessary—if the commission were to broaden its focus a bit, to look for example at the problem of the assertion of U.S. jurisdiction over the foreign subsidiary of the American parent corporation—that its members become expert in every particular substantive area of U.S. law where this problem of nationality jurisdiction occurs.

As I think you have seen, Mr. Chairman, there are certain common parallels to this nationality jurisdiction over corporate entities problem in the Foreign Corrupt Practices Act area, in the export administration area, in the foreign assets control area, and in seeking information abroad in the antitrust, securities, and com-

modities areas. The key problems are essentially generic across these areas. It would be misleading and could be ultimately unsatisfactory if we were just to focus on the antitrust manifestation of the corporate nationality problem and not appreciate that in addressing it in the antitrust context, we ought to be addressing it in these other contexts as well.

I think the other point that the chamber would highlight is that we think that there is now legislation currently under review by this committee and by the sister committee in the House of Representatives to deal with some of the concerns which have been addressed by Senator Javits, by Mr. Shenefield and others: the clarification of U.S. export jurisdiction, the need to give the businessman a clear sense of what he can do abroad.

As you know, Mr. Chairman, the U.S. chamber strongly supports three pieces of legislation which are before the Congress. We think these would go a long way to clarifying those export-related questions, and if we can attend to those issues with that legislation, by all means let us do it and let us turn to these other questions.

However, the main burden of my remarks is that we need some kind of a commission. We should not delay while we fine-tune the points of, "Should we cover this or should we cover that?" If we can have only an antitrust commission, that is better than no commission at all. If our chance for a commission to consider these questions is better put forward as a broader, more generic commission, by all means let's not delay if that is the best route on which to proceed.

We have had a lot of thoughtful discussion. I think we may well need some further discussion on this before this committee acts, but by all means let's not delay too long. Let's have action in this area. Let's have the commission focus on laying the foundation and then we can look to legislation, then we can look to a coherent executive branch policy to be negotiated with our allies.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you very much, Mr. Rosenthal. I am appreciative of the very positive tenor of your statement. I think it is very helpful.

I assume, then, that you would agree on the metaphor of Alexander and the Gordian knot: Let's get on with it.

Mr. ROSENTHAL. Absolutely, Mr. Chairman.

Senator MATHIAS. Thank you.

Mr. Joelson?

STATEMENT OF MARK R. JOELSON, ESQ., WALD, HARKRADER & ROSS, WASHINGTON, D.C.

Mr. JOELSON. Mr. Chairman, I am very glad to be here today, too, and I will try to be as brief as possible, particularly since I am in agreement with very much of what has been said today. Please include my entire prepared statement in the record.

I testified in support of this bill when you and Senator Javits first introduced it, and I believe as you do that the developments since that time have made it even more timely and appropriate. The sooner we do it, the better.

Senator MATHIAS. I hope your testimony today is as effective as it was then in getting it unanimously passed by the Senate.

Mr. JOELSON. I hope it does not take another 2 years to pass the Congress, but we are both trying very hard.

I think, as the bill recognizes, that the Nation's antitrust laws were first designed long ago, long before we found ourselves in a global economy and long before we found ourselves faced with the kind of problems that we have today. The courts and the departments have been working very hard to cope with these problems but the strains on both the agency process and the judicial process have become very clear in recent years.

It is clear that there is a need for a comprehensive congressional look and, as the others have said, it may well be that legislation is not needed, although I suspect some will be needed. However, let us look at where we are first, and let us approach any bilateral negotiations with a good idea of what we need and where our laws in fact can be reshaped.

The laws in question and the issues in question are not solely issues of antitrust enforcement, and it becomes very difficult for our fragmented system—fragmented in the sense that our departments have particular responsibilities and in the sense that our courts can exercise only judicial power—to try to reconcile the need to promote competition, the effort to stimulate exports, the property rights of private litigants, the legitimate interests of foreign sovereigns, and delicate matters of international relations. It is just too difficult, and the process is showing that. The courts need some guidance.

As the committee is well aware, we have a continuing debate which has been reflected this morning very eloquently by Senator Javits and by Mr. Shenefield, over whether the antitrust laws are a problem from the viewpoint of export trade. Let us resolve this debate once and for all; let us have an objective look at it. Let us determine whether or not there are significant problems posed to exports by the antitrust laws and, if so, what we can do about it. The present situation really—unless a bill of this type is enacted—suggests that the debate will go on forever, and that we will never resolve it, and we will never do about it what we can.

As has been mentioned, and as of course you are aware, there have been other legislative efforts in this area. There is the proposed Exporting Trading Company Act which would provide for antitrust clearance certification procedures. Then there are counter proposals which would not involve this rather bureaucratic certification procedure but would clarify legisatively the scope of the antitrust laws.

The problem, as I have testified on these other pieces of legislation, is that these efforts would be piecemeal; they would deal with only one part of the antitrust-export issues, not to mention that they would not deal with the import issues at all. It is very important that we have an overall road map, that we have an integrated view of what our antitrust philosophy is and what our trade philosophy is, before we proceed both nationally and in terms of meeting with other nations. Therefore, let us move ahead first to have the commission to consider these issues relating to exports.

Now the other side of the coin, as I think you characterized it, is this very important debate and point of friction concerning the application of our antitrust laws to conduct abroad which involves

foreigners where those foreigners are in compliance with the national laws of their countries. The traditional effects test, the Alcoa doctrine, obviously has run into serious difficulties and this is why we have new doctrines such as the Timberlane rule which contemplates that the jurisdictional issues will be resolved by a weighing of 10 or more factors.

On the other hand, the courts are having great difficulty approaching this balancing test. As Mr. Griffin indicated at the outset of the testimony, it is almost impossible for a private lawyer like me to counsel a client in advance of litigation how this jurisdictional test will be resolved. The law loses much of its value if it is not predictable and if it is not counselable.

Much of this problem could be resolved, granted, if the executive branch were to appear in each of these cases and state its views with respect to the interest of the United States internationally, and give an overall assessment of what the impact of the particular case is and how it should be resolved. The fact and the record is that the executive branch has not appeared in any of the important, controversial cases. In the OPEC litigation in particular, they were invited to do so by the court and they did not do so, and the court went ahead and did the best it could to determine what the various interests were that were involved.

This is because these are political cases. There is an inevitable reluctance, as the chairman well knows, to get unnecessarily involved in a political case. I think this will continue unless we find a resolution to it, also.

Senator MATHIAS. Let me interrupt you to say that I think that is a very significant point that needs some thoughtful attention. It can cut both ways for business. I think that if the Government has a mechanism by which it can intervene in some way that it might, let us say in connection with a dispute with the Japanese, prove to be a burden on American business in pursuing rights and claims because the delicacy of our political and security relationship with the Japanese might mitigate against pressing on economic claims, particularly private economic claims.

Therefore, I think we have to understand exactly what we are doing in that respect but I think it needs to be looked at and a policy developed because we are just kind of flopping around from case to case at the present time.

Mr. JOELSON. We cannot leave it to individual judges who are ill equipped, especially if they do not have the assistance of the U.S. Government, to try to make these determinations. There will be different judges in different cases. Therefore, the case for a comprehensive look is just a very, very strong one.

In conclusion, I would say that obviously there are other issues than the two that I have emphasized, the two being the export picture and the import picture. The whole question of what do we do about foreign government activity which compels or encourages or approves private action, which is then vulnerable under the U.S. antitrust laws, deserves a very careful look. You, Senator Mathias, have recognized that by the introduction of S. 1434, which deals with the "act of state" doctrine, one more piece of this very important and I think unitary puzzle.

Thank you very much.

Senator MATHIAS. Thank you, Mr. Joelson.

Mr. ROSENTHAL. Mr. Chairman, may I just make one supplementary comment to your colloquy on the OPEC litigation and the inability of the Government to intervene? One of the questions which has been raised is: "Do we need a commission like this?" Can't we hold hearings like we are holding today, look at some of these questions, and come up with legislation as we do in a regular legislative process?

As I think your colloquy demonstrates, we are talking about issues here on which there is no coalescence at this point to the point where we have ripened issues where we can draft, where we can focus on legislation, where we can see what the competing interests are and try to balance and resolve them. We really here have an opportunity for fresh thinking at a point before there has really been any development toward points of view. There is a wide variety of concerns but there really is here the opportunity for developing some standards.

If we can develop some standards which reasonable men can agree on, then I think the business community and others may be able to get some protection from a Government intervention because the Government will not be intervening ad hoc and piecemeal based on whatever particular negotiation is going on currently with a particular state, but will be intervening according to a framework and under a set of principled rules which other governments have agreed with and which are the product of consensus with the Congress.

That is why we cannot do it by legislative hearings. That is why we cannot do it by just scholars studying the question. That is why we cannot do it by an ad hoc consideration by the individual court which picks up one of these issues by the happenstance of a case being litigated before it.

Mr. JOELSON. I would like to add one comment, if I may, on the question of whether or not the commission study should be broadened to encompass issues of extraterritoriality. I think that ideally and if it is possible, they should also be studied because they are important issues; they are not all that different conceptually, and they deserve attention.

I do have concern as to whether it is feasible to broaden the proposed commission's assignment now. I would, for example, hate to see an approach whereby it was agreed that ideally the study should be expanded but then because the study would be so expensive and so time-consuming, the entire study would falter. Therefore, I feel that, in theory and ideally, let's do it all if we can but if we cannot, let's move the antitrust piece—which is a very important one—ahead.

Senator MATHIAS. I would essentially agree with that. I do not want to violate one of the most basic rules of courtroom behavior, which is, when you think the court is with you, not to ask any more questions. However, would you agree that this is a problem which is not going to get easier if we postpone it but which is going to get more difficult?

In the nature of events today the United States is going to be more and more enmeshed in economic relationships with other parts of the world. Today our principal trading partners are in

Europe, with a cultural and legal background which at least is comprehensible to us. In a very few years we will be forced, by our need, both for natural resources and for markets, to be dealing massively with other parts of the world who have a totally different cultural and legal foundation. Unless we have this resolved within the Western World very quickly, the chance of sorting it out on a global basis is just going to be horrendous.

Mr. JOELSON. Yes, the economy can only get more international. We have to agree on approaches with the nations that share a common economic approach with us. The developing nations are making demands on us, and we had better know what we are doing before we come to terms with them.

Senator MATHIAS. Thank you very much.

Mr. ROSENTHAL. I very much agree. I think this has national security implications. I think that is what you and Senator Javits were saying at the beginning. We are talking here about our ability, in an increasingly contentious world where there is an increasing competitiveness for scarce resources, and we have to work harmoniously in this world with our closest trading partners.

When the Prime Minister of Australia comes to the United States and puts on the top of his agenda at a meeting with President Reagan the extraterritoriality problem, if this is a serious disruption in our relations with the Government of Australia and with several other governments, then this is a serious problem, and it is not getting better.

Senator MATHIAS. Well, I agree. Let me say that in addition to any response to questions we may propound to you, if you have further thoughts they will be very welcome.

Thank you.

Mr. JOELSON. Thank you.

Mr. ROSENTHAL. Thank you very much.

[Prepared statements follow:]

STATEMENT

OF

JOHN H. SHENEFIELD

Mr. Chairman and members of the Committee:

I welcome this opportunity to comment on S. 432, a bill to establish a Commission on the International Application of the United States Antitrust Laws.

I support the enactment of this bill.

My support is based on several premises that I should like to share with the Committee. First, the subject of the application of U.S. antitrust law to international commerce is confused. Much of what is said about this subject is uninformed. We are told that businessmen are uncertain about the scope of antitrust applicability, and that this uncertainty is an impediment to desirable commercial activity. This Commission would have the opportunity to analyze, clarify, and declare the relevant principles for the benefit of all. That would be a signal service, and the beginning of a more rational national debate.

A national debate is overdue because there are important questions of national policy to be reviewed. How important a component of our international economic policy is competition policy to be? How far are we as a nation willing to sacrifice competition domestically in order to permit our business firms to compete with foreign firms abroad? Is there any point in applying antitrust to the

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This testimony is presented as my personal view and not on behalf of any organization or client.

conduct of American firms abroad if there is no adverse effect from the anticompetitive conduct on American consumers? Finally, to what extent and in what ways, if at all, should antitrust enforcement take into account such factors as the increasing incidence of state-owned enterprises, national security factors, employment effects, or foreign natural resources policy? A broadly based and expert Commission could begin at least the process of serious national debate on these difficult issues.

Third, antitrust investigations and prosecutions, and especially private litigation, have engendered adverse reactions - in some cases, overreaction - from friendly governments abroad. We have drifted into the habits of confrontation, with challenges to jurisdiction, diplomatic protests, and default judgments now the order of the day. A Commission could perform an important service by calmly assessing the state of international law on the subject of extraterritorial application of law, and articulating a coherent and moderate policy of law enforcement to protect our economy that exhibits appropriate sensitivity to the sovereign interests of other countries, and articulates principles for resolving the inevitable disputes. I do not believe that policy statement will be sharply different from the approach of the United States government to these issues in recent years. But the Commission will have a credibility that speeches by prosecutors or briefs in specific cases can never have. Perhaps the Commission statement will prove to be the beginning of a process that will culminate in an internationalization of economic regulatory dispute resolution.

Finally, this country has always been a leading voice for free enterprise, economic liberty and competition

around the world. We speak first about our own economy, of course. But with modesty and sensitivity, we can hope to persuade others, using the language and tools of diplomacy and not the weapons of law enforcement. I believe that it is in our own national interest to develop a respect for the free market throughout the international economy. That message is probably more vital in these complicated days of interdependent economies and third world aspirations than it has been in the past. We do ourselves no favor when we allow ourselves to be perceived as the apostles of cartel and predatory enterprise. Protectionism is neither becoming nor necessary. I am utterly confident that our economy, disciplined by competition at home, will more than hold its own abroad. And I see the adoption on a worldwide basis of the principles of competition as a worthwhile policy in the long run for the United States to support. The Commission is an opportunity to continue the process begun so well by the United States after World War II to promote open economies and free enterprise as a way of international life.

But just as I support the bill for the reasons I have stated, there are purported justifications for the Commission with which I do not agree. I do not see the antitrust laws as a significant impediment to exports, and I do not think the Commission can be justified on that ground. I do not see antitrust law or analysis as failing adequately to adjust to the realities of international competition, where that is in fact a reality. I do not see antitrust as a useful barrier to foreign investment or foreign imports into the United States. I think the Commission would be

deflected from far more important tasks were it to spend any significant time pondering these questions.

My experience as Chairman of the National Commission to Review Antitrust Laws and Procedure gives me a special vantage point from which to offer comment on the mechanics of the Commission. Section 2(b) establishes the Commission's membership at 18, of which 6 are to come from the private sector. I would recommend the expansion of the Commission to provide for more members from outside government. While one does not seek a Commission solely of experts, a great deal of expertise will be required in a careful analytical survey of the issues mandated for the Commission. Antitrust specialists, academic people, practitioners, businessmen, international law specialists - all will be necessary. Given the reality that at any one meeting a number of members will be unable to attend for one reason or another, a Commission that totals 24 or 25 is manageable, and in this case, desirable.

Section 2(c) designates the Vice President of the United States as Chairman. If that assignment were welcomed by the Vice President, it would be indeed desirable. I would wish to receive clear indications from the Vice President that he welcomes the responsibility. If the Vice President is unwilling to serve, I would suggest in his place either the Attorney General or the Assistant Attorney in charge of the Antitrust Division as Chairman, with the Legal Advisor of the Department of State as Vice Chairman. I do not believe that appointment of a Justice Department official as Chairman necessarily skews the judgment of the Commission. The Commission will be as balanced and objective as its membership, regardless of who is Chairman.

It is essential that the Commission have an adequate budget. No one should assume that existing budgets in the executive branch, already pared to the minimum, will be able to absorb the large additional expenditures required for the operation of a Commission for one year.

In addition, the Commission needs to be able to hire professional staff. While some staff assistance can come from the government on a loan basis, I would opt for a substantial admixture of staff from the private sector. It seems to me especially important for the executive director position to be filled by a non-governmental expert.

Finally, I would recommend inclusion in the bill of some provision to protect the confidentiality of information against disclosure on the public record. This may be critically important in connection with examination of foreign relations topics or the details of government investigations and prosecutions. The Commission members should be aware at the outset that there will be limitations, based on grand jury secrecy rules or the civil investigative demand statute, that will prevent their having free access to all materials. Nevertheless, I found that it was possible to work within the constraints imposed by these provisions if it were guaranteed that any sensitive material would be treated confidentially. Some provision for closing meetings to the public when such matters are to be discussed seems to me to be essential.

The Commission seeks to study the substance of the antitrust law as applied to international transactions, the extent to which current antitrust law impedes desirable international transactions and the diplomatic and foreign relations application of antitrust to international transactions. Of course these issues appear in a broader

context reaching beyond the boundaries of antitrust law. Other United States statutes applied extraterritorially in the international arena have promoted uncertainty, are alleged to be inconsistent with U.S. trade objectives and have proved to be irritants to our international relations. Broadening the charter of this Commission to deal comprehensively with this unitary problem would therefore make sense. At the very least, the Commission will have to understand that antitrust is not unique but is part of the larger issue.

It might be well to make clear that the Commission is not limited to analyzing the items listed in the bill, because there are other important pieces of this puzzle. In particular, an examination of the treble damage remedy applied to international transactions is overdue, and offers, I believe, a fruitful prospect for substantially alleviating irritation on the part of other governments. The doctrine of comity, mechanisms for informing courts of the foreign relations effects of antitrust cases and the extraterritorial application of foreign law all deserve close scrutiny.

In summary, the Commission would provide an opportunity - an opportunity to clarify confusion that is said to exist, to dispell the persistent myth that antitrust is an impediment to important economic transactions and relationships, and to demonstrate that extraterritorial application of antitrust law in defense of our own economy, appropriately sensitive to the realities of the world in which we as a Nation live, is based on sound principles of international law and is broadly supported by the American people. Most of all, it is an opportunity to pursue the ideal of competition on a worldwide basis, a policy in which the United States has had and should continue to have a leading and influential voice.

Statement of the Chamber of Commerce of the United States

ON: A COMMISSION ON THE INTERNATIONAL APPLICATION OF U.S. ANTITRUST LAWS (S. 432)

TO: SENATE JUDICIARY COMMITTEE

BY: DOUGLAS E. ROSENTHAL

DATE: DECEMBER 3, 1981

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

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STATEMENT
ON
A COMMISSION ON THE INTERNATIONAL APPLICATION OF U.S. ANTITRUST LAWS (S.432)
before the
SENATE JUDICIARY COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Douglas E. Rosenthal
December 3, 1981

I am Douglas Rosenthal, a partner in the law firm of Sutherland, Asbill & Brennan here in Washington, and Chairman of the Antitrust Working Group of the Export Policy Task Force of the U.S. Chamber of Commerce. 1/ The Chamber's membership of more than 200,000 businesses, chambers of commerce, and trade and professional associations is committed to the encouragement of a strong domestic U.S. economy and open world markets in which private enterprises have the opportunity to compete fairly.

The Committee's invitation to comment on S.432 is appreciated. This bill addresses the increasingly important and disturbing difficulties caused U.S. companies, limiting their ability to compete effectively, by the conflicting inter-

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1/ From 1977 to 1980 I was Chief of the Foreign Commerce Section of the Department of Justice's Antitrust Division, and I am, currently, Chairman of the Ad Hoc Committee on the Extraterritorial Application of U.S. Law of the American Bar Association's International Law Section. I have recently been retained as an expert on extraterritoriality by the Canadian Government and in that connection have registered under the Foreign Agents Registration Act. My remarks today are on behalf of the Chamber and myself only and do not necessarily reflect the policy of the Canadian Government or the viewpoint of Canadian officials.

national applications of U.S. and foreign laws. For the past two years, both the Chamber 2/ and I 3/ have, supported S. 432 and its predecessor bill. This bill, which was passed by the Senate last year, calls for creation of an 18 member Presidential commission, chaired by the Vice President, with 8 legislators, 4 members of the executive branch, and six representatives from the private sector to report to the President and Congress concerning the international aspects of the antitrust laws. As worthy of support as the bill is, it can be improved in one significant respect, that is, by expanding the Commission's focus beyond antitrust exclusively to deal with extraterritoriality as a generic U.S. foreign policy problem.

As national economies have become increasingly interdependent, as business enterprises have become increasingly multinational, and as technological advances have permitted dramatically more rapid and accurate international communications, it is easier for individuals and enterprises to avoid the application of any one nation's economic laws and more difficult for any one nation to regulate conduct which may have a substantial adverse impact upon its national policies and interests.

2/ See Weisberg (ed.) A National Export Policy: Recommendations for Expanding U.S. Exports, International Division Chamber of Commerce of the United States, p. 28.

3/ Statement by me introduced into the Congressional Record by Senator Mathias on August 27, 1980 at S11773; see also Rosenthal, "What Should be the Agenda of a Presidential Commission to Study the International Application of U.S. Antitrust Law?" 2 Northwestern Journal of International Law & Business 372 (Autumn 1980).

For these reasons, virtually all nations have found it desirable, and even necessary, to seek to apply at least some of their economic laws to monitor and regulate conduct beyond their national boundaries. Tensions are created because the laws and policies of nations differ in considerable degree as to what is permissible business conduct and as to which institutions should determine what is permissible. These differences are substantial, even between close allies and trading partners with a common heritage.

The problem of extraterritoriality is not so much whether states have the right to apply their laws to reach persons and conduct beyond their territory (though there is still some debate on the point). The core of the problem, rather, is what to do where two or more states seek to apply conflicting sovereign laws to control the same conduct. This is what I will be referring to as "the extraterritoriality issue". Extraterritoriality is a generic issue of international commerce. It encompasses the entire range of those economic laws from A to Z, from antitrust to zoning, with which businessmen have to deal. Antitrust conflicts are only a part of this much larger spectrum.

Within the United States' federal system of government, "extraterritorial" disputes between particular states of the United States can be resolved by the Supreme Court. But there is neither a Supreme Court nor agreed standards or institutions of public or private international law for avoiding,

limiting, or resolving most of these conflicts in the international application of national economic laws.

This deficiency has been bearable until recent years, at least from a U.S. vantage point. So long as the United States dominated free world trade and the United States domestic market was more important to U.S. business then all foreign markets put together, our law and regulatory policy could be expanded to resolve international economic disputes and without much regard to the effect this had on others. U.S. businesses on the whole benefitted from this Lex Americana because they were most familiar with U.S. law and practice. Also, foreign states were reluctant to retaliate against U.S. businesses, even when U.S. laws and policies were given effect by U.S. authorities in ways which foreign governments found objectionable.

Today, however, the situation has changed. The United States no longer dominates free world trade, and access to foreign markets is becoming as important to many U.S. businessmen as the domestic market. Because of these developments, foreign nations are no longer acquiescing in the application of U.S. law and policy in a manner that may be contrary to their interests. Some, in fact, are taking a page from our book and applying their laws and policies aggressively to reach Americans acting in the United States -- exercising jurisdiction which we in the United States would consider excessive were we to try it.

Let me give you a few recent examples to illustrate that the problem is increasingly serious.

o In the mid-1960's, the U.S. Treasury Department ordered Freuhauf-United States not to permit its French subsidiary to sell truck parts in France for later assembly and shipment to the Peoples Republic of China. The French Government wanted the French subsidiary to fulfill the contract. American and French businessmen were threatened with prison if they did not comply with mutually incompatible legal orders. After intervention by a French court, the United States Government backed down. No rules for resolving such conflicts were developed out of this confrontation. No international agreements were negotiated. No changes in U.S. or French law were implemented.

What is the U.S.-based multinational enterprise to do when one government damns it if it acts and another government damns it if it does not? The Freuhauf "problem" has been replayed in a variety of forms on several occasions during the past fffteen years, at substantial cost to those involved. More than one half of the OECD member states have now adopted laws which, in certain instances, require U.S. businessmen not to comply with U.S. courts or U.S. law enforcement agencies. The main victims of such conflicts are U.S. business people, who are threatened with loss of business, criminal sentences, and protracted litigation.

o Earlier this year, the Conservation Council of Western Australia, a private Australian environmental group, brought suit in the United States against Alcoa and Reynolds Metals. The plaintiffs sought to stop mining projects undertaken with

the explicit approval of Australian authorities wholly within Australia by affiliates of Alcoa and Reynolds, because these activities would, purportedly, harm the environment in Western Australia. If the lawsuit had succeeded, it would have resulted in the exclusion of Alcoa and Reynolds only from participation in the Australian mining venture. There is no possible way a U.S. court could prevent foreign enterprises from continuing to mine in Australia. Even though there was no U.S. interest which justified the maintenance of this suit and even though formally requested to do so by the Australian Government, the United States Government was unwilling to file an amicus brief in support of dismissal.

In this case, the district court reached the right result with only the aid of the parties and a filing by the Government of Australia. 4/ However, at least one other district court has recently questioned whether trial courts have the expertise or even authority to balance competing national interests under U. S. law. Accordingly, how can one say, as some have, that there is no extraterritoriality problem that cannot be resolved on a case-by-case basis, in specific adjudications? The courts are unsure of the standards, and the Federal Government has been unable or unwilling to help the courts fashion and apply standards in particular cases?

o In September of this year, the British Monopolies and Mergers Commission opposed the proposed acquisition of the

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4/ This case is reported at 518 F.Supp. 270 (W.D. Pa. 1981).

London-based engineering and construction company Davy Corporation Limited by the American firm Enserch Corporation. The acquisition would have enabled Enserch to compete more effectively internationally. Several factors were cited in support of the unanimous decision to block the merger. The one that is most relevant here is the possible adverse effect upon Davy if it had become subject to the provisions of certain U.S. [extraterritorial] legislation, in particular the Foreign Corrupt Practices Act. 5/ Construction companies bidding for contracts in the Third World are viewed by this British official body, among others, as being at a competitive disadvantage because of even the possibility that U.S. criminal prosecutions may be brought against foreign persons participating in foreign transactions which are accepted conduct where they occur. The long arm of this U.S. law is viewed abroad as anticompetitive and U.S. firms suffer as a consequence. 6/

Under many U.S. statutes, the foreign subsidiary of a U.S. parent corporation is deemed a "United States person" or controlled by a United States person, fully subject to U.S. law -- even when the parent owns less than all of a subsidiary's stock and the subsidiary is incorporated under and owes alle-

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5/ See Report of the Monopolies and Mergers - Commission, Presented to Parliament by the Secretary of State For Trade, September 1981, p. 59.

6/ This long arm reach of the Foreign Corrupt Practices Act Is not affected by the amendments to that Act passed by the Senate on November 23 of this year (S.708 - The Business Accounting and Foreign Trade Simplification Act).

giance to the laws of a foreign jurisdiction. If the subsidiary is, for example, a French company, it is a French person obligated to obey French law as to conduct in France.

o Another illustration of why the extraterritoriality problem is harmful to U.S. interests is raised by a pending proposal in the European Economic Community to increase disclosure requirements of corporate plans contemplated by the foreign parent enterprises of European subsidiaries -- even arguably, if the plans are tentative and likely to have only an indirect effect in the European Communities. 7/ (This development has led Senator Symms of Idaho to introduce legislation (S. 1592) that would block access by foreign authorities to the confidential information of businesses located in the United States. This is an ironic response after years of official U. S. opposition to foreign blocking legislation.)

o A similar issue has recently been raised in Europe, and elsewhere, when a United States parent seeks to close down an unproductive foreign plant and is told that for the privilege of doing so it must contribute funds from abroad to compensate unemployed local employees. This, of course, has the effect of holding foreign parent shareholders liable for claims against the domestic subsidiary.

The preceding brings home to the American businessman that the United States is no longer the only nation which ap-

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7/ See e.g. "Regulation in Europe Worries U.S. Firms"; Legal Times of Washington, November 2, 1981, p. 1.

plies its laws aggressively to reach foreign persons and activities. What has been sauce for the goose is indeed becoming sauce for the gander. We can no longer be complacent about the extraterritoriality problem.

A common characteristic of these examples is that, notwithstanding the variety of substantive legal fields they touch and the variety of friendly nations with whom they put us at odds, they all involve jurisdictional conflicts between nations. They all arise from the lack of standards and procedures for resolving legal disputes short of confrontation -- confrontation which penalizes the business executive, American and foreign.

These problems do appear in the context of U. S. antitrust enforcement. But their appearance in the antitrust field is more symptom than illness. For this reason, a commission which focuses solely on the antitrust problem must necessarily miss the more generic underlying issues. Such misplaced focus, as State Department Legal Adviser Robinson and Assistant Attorney General Baxter point out, can be positively misleading. In recent years, for example, there has been more effort made in the antitrust field to address the problem of jurisdictional conflicts than in most other areas. Antitrust notification and consultation, though imperfect, is more advanced than notification and consultation as to assertions of jurisdiction over foreign subsidiaries (so-called "corporate nationality jurisdiction"). Without knowing what has been happening on the question

of corporate nationality jurisdiction, how can a commission judge the effectiveness of existing antitrust notification and consultation mechanisms?

At the beginning of my remarks, I said that the Chamber and I have in the past supported S. 432. We renewed this support as recently as this spring, because we believed that even partial study of the problem was better than no study. We were advised that it was not practical to establish a commission with a broader scope of inquiry. We have recently concluded that it may, after all, be feasible to seek this objective -- especially since resistance has mounted to the creation of a purely antitrust-oriented task force.

For one thing, there is legislation pending before this Committee which would address more directly and promptly the Chamber's longstanding concern with purported inhibitions to U.S. exports arising from the application of U.S. antitrust laws to U.S. exporters. The Chamber supports S. 795, The Foreign Trade Antitrust Improvements Act of 1981, and S. 816, the Pfizer legislation. In addition, S. 734, the Export Trading Company Act of 1981, passed the Senate earlier this year. These bills, with some modification, are mutually compatible and move towards ameliorating the perceived export disincentive impact of U.S. antitrust laws, while maintaining a strong U.S. commitment to antitrust enforcement. Given the progress on those three bills, we see no benefit in their being rexamined by a commission.

Another consideration is that the Department of Justice is strongly and understandably opposed to the possibility that U. S. antitrust enforcement in foreign commerce will become a scapegoat for concerns which are generic to international jurisdictional conflicts. A recent statement by Assistant Attorney General Baxter, 8/ and one by his predecessor John Shenefield, 9/ evidence a refreshing acknowledgment that there are substantial generic problems and no easy solutions to them.

Additionally, it is unlikely that the Vice President who we believe should lead this commission, would be able to justify taking the time to chair consideration of just the international implications of U.S. antitrust laws. By contrast, the impact of extraterritoriality, of international jurisdictional conflicts on U.S. foreign relations and business opportunities, is emerging as one of the critical areas of foreign policy in this decade. Because of its importance, because it is an issue which exceeds the responsibility of any single executive branch agency, and because it falls within the foreign relations interest and expertise of the Vice President and is worthy of his high position in the Administration, broadening the commission's focus is all the more appropriate.

8/ November 19, 1981 Statement before the Subcommittee on Monopolies and Commercial Law of the House of Representatives' Committee on the Judiciary.

9/ Remarks by John Shenefield before a joint meeting of the Georgetown International Law Institute and the Ad Hoc Task Force on the Extraterritorial Application of U. S. law of the ABA's International Law Section, December 10, 1980, published in CCH 5 Trade Regulation Reports ¶50,424.

I have now indicated why a commission to deal with the generic problem of extraterritoriality is desirable and why a focus on purely antitrust extraterritoriality is incomplete. But many still question whether a broader commission is a feasible alternative. Let me now turn to some of the objections which have been raised to its practicality and our responses to those objections.

To begin with, wouldn't such a broadened inquiry be too comprehensive, too unfocused, too complex? I think not, if we stick to a few key issues and concentrate on case studies that are illustrative rather than exhaustive. The fundamental issue is: How can we resolve international conflicts of sovereign economic jurisdiction? This subsumes perhaps a half dozen sub-issues. My preliminary outline of these sub-issues can be supplemented, pruned, or otherwise modified as this Committee sees fit:

1. To what extent do unresolved jurisdictional conflicts, including situations where foreign laws are applied extraterritorially, impose serious trade barriers, costs, and uncertanties for U.S. businesses?

2. What are the principles for setting appropriate jurisdictional and other limits to the application of U.S. law to foreign persons, as to conduct beyond our frontiers, where foreign governments have conflicting laws and policies?

3. Which issues of conflict between the laws and policies of sovereign states should be resolved by diplomacy and which by litigation?

4. What laws or mechanisms would be appropriate for removing essentially diplomatic disputes from adjudication?

5. What changes in the ways we conduct litigation might better balance the vindication of valid legal rights with the burdens such litigation imposes in international commerce?

6. What mechanisms or standards exist, or can be established, for resolving unavoidable jurisdictional conflicts between foreign states?

Such an agenda would, we believe, be manageable during a twelve or eighteen month period of investigation. This is especially true if the commission's role is not only to recommend necessary legislation, but also to recommend possible future non-legislative regulatory or policy actions. This deserves emphasis because it has been suggested that such an agenda could be better addressed in legislative hearings. A Presidential commission, with a small but expert staff to focus intensively for a sustained period, strikes the best balance between a comprehensive academic inventory on the one hand, and, on the other, a necessarily fragmented and incomplete congressional overview, which is the best that could be hoped for from even several days of hearings. The proper time for full congressional hearings will be after the commission has made its report.

Some have wondered whether S. 432, with a mandate broadened in this manner, would require referral to a number of congressional committees. If, as we believe, the problem is essentially one of international conflicts of <u>legal</u> jurisdiction, then approval of the Presidential commission is squarely before the two Judiciary Committees, which have the

primary competence to review and report on legal issues. By all means, Judiciary Committee members and their staffs should consult with the members and staffs of other concerned committees.

Some may wonder whether such a commission would be too costly and incompatible with this Administration's concern with deregulation and efficiency. We believe that the limited amount of funding required to administer the Commission can be handled within existing programs. If these problems are not considered systematically by a distinguished panel of leaders from the public and private sectors, who otherwise will do it? What more efficient alternative is there? The staffs of existing government agencies involved in this area have institutional perspectives which, though understandable, are unlikely to generate fresh and impartial thinking. Moreover, the work of the commission we are discussing is quite compatible with President Reagan's initiatives to substantially deregulate the domestic economy. One way of articulating the Commission's objective is to find ways to maintain effective law enforcement and viable diplomatic and trading relationships, while working toward the deregulation of international markets.

Finally, some will question whether such a commission serves U.S. interests. In the past, foreign governments and executives of foreign corporations have been the most outspoken in expressing concerns about this problem. Would such a broadened Commission playing into their hands at the expense of U.S. interests?

I am here on behalf of the Chamber to state emphatically that it is no longer appropriate to view this as "the foreigner's problem." It is our problem too, and the American business community wants and needs your help in doing something about it. Such a commission could lead to constructive changes in U. S. and foreign laws and policies. We should do this now, before the problem further escalates to become, after protectionism, perhaps the most divisive issue of international legal-economic policy among developed nations.

If you accept our recommendation for a broadened focus for the proposed Presidential commission, we would be pleased to assist you in preparing the necessary technical amendments to S. 432.

Summary of Statement
of
Mark R. Joelson
on S. 432

He supports the enactment of S. 432, the bill to establish a Commission on the International Application of Antitrust Laws, as a timely and appropriate measure. The nation's antitrust laws were designed by the Congress many years ago with the U.S. domestic market primarily in mind, and they require reexamination today in the context of our interdependent international economy. The courts have attempted to adapt the operation of our antitrust laws to take into account international considerations where they apply, but this process has proven to be difficult. The issues need Congressional attention, because they embrace a wide array of important national concerns, such as the need to promote competition, the effort to stimulate exports, property rights of private litigants, the legitimate interests of foreign sovereigns, and delicate matters of international relations.

There has been a continuous national debate over whether the antitrust laws impede our export trade and over suitable remedies in this regard. The Commission proposed by S. 432 would be well suited to make an objective and in-depth study to resolve these issues.

Furthermore, the application of the United States antitrust laws to proscribe certain conduct abroad by foreigners, even where that conduct is lawful in the foreigner's home country, has become a significant irritant in the relations between the United States and some of its closest allies. While considerations of international comity can effectively be taken into account by the government prosecutors, the courts have been groping for ways to give proper weight to these concerns in the context of private damage suits, particularly where the Executive Branch does not offer an expression of its views. These matters, also, deserve careful consideration by the proposed Commission.

Among the other timely questions which should be submitted to such a Commission are problems under the Foreign Sovereign Immunities Act of 1976, the sovereign compulsion defense and the act of state doctrine, as they pertain to antitrust cases.

90-805 O—82——12

STATEMENT

of

MARK R. JOELSON

Wald, Harkrader & Ross

Washington, D.C.

Before the

United States Senate

Committee on the Judiciary

Hearing on S. 432

"To Establish a Commission on the

International Application of Antitrust Laws"

December 3, 1981

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I appreciate the opportunity to appear today, at the invitation of the Committee, to testify concerning S. 432, a bill to establish a Commission on the International Application of Antitrust Laws. I testified in support of this important piece of legislation when it was first introduced by Senators Mathias and Javits in 1979 and believe that the developments in the field in the intervening years have made the proposal an even more timely and appropriate one for enactment.

I am a partner in the Washington, D.C., law firm of Wald, Harkrader & Ross and co-author of a book titled "An International Antitrust Primer," as well as of a number of law review articles on international antitrust issues. I was formerly Chairman of the Committee on the International Aspects of Antitrust Law of the American Bar Association's Section of International Law, and am presently a Vice Chairman of that Section, although I do not purport to be speaking here on behalf of the ABA or that Section. As a private practitioner, I am engaged in advising and representing a wide range of clients, including United States firms that export, U.S. trade associations, foreign companies, and foreign governments. 1/

1/ My firm and I are registered pursuant to the Foreign Agents Registration Act on behalf of the Government of Australia.

I have represented some of the latter in a number of international antitrust lawsuits, including the uranium antitrust cases. The comments that I will offer today are my personal ones, reflecting this variety of experiences and espousing no particular client viewpoints.

I believe that our Nation's antitrust laws remain vital to our economic well-being, but that they must be re-evaluated and, possibly, reshaped, if we expect them to be viable and effective in the '80s and beyond. These antitrust laws were first designed by the Congress many years ago, with the "trusts" of the U.S. domestic market primarily in mind, and well before we found ourselves immersed in the dynamic and interdependent global economy that we have today. The courts, departments, and agencies inevitably have had difficulty applying legislation enacted in 1890 and 1914 to the international economic conditions of the 1970's and 1980's.

There has been much useful judge-made law fashioned, to be sure, but in recent years the strains on the judicial process and the consequent need for a comprehensive congressional look at the problems have become very apparent. It is generally conceded that the issues cannot satisfactorily be addressed simply as questions of antitrust enforcement, since they embrace a wide array of important national policy concerns, such as the need to promote competition, the effort to stimulate exports, property rights of private litigants, the legitimate interests of foreign sovereigns, and delicate matters of

international relations. The courts may well wonder what weight, if any, to give the various concerns, absent congressional guidance. In an effort to be responsive, the federal courts are indeed mooting new doctrines, but are not doing so with one voice.

Let us consider first the persistent questions about U.S. exports and the antitrust laws. As the Committee is aware, when the presidentially-appointed National Commission for the Review of Antitrust Laws and Procedures submitted its recommendations in 1979, it was constrained to do little more than touch on some of the questions pertinent to the international aspects of antitrust. A Business Advisory Panel was appointed by the President to work with the Commission on export issues and was asked to concentrate its efforts on questions pertaining to the Webb-Pomerene Act. The Panel observed in its report that, in its view, "there exist[ed] [other] antitrust export issues capable of having a more significant impact [which] the Panel did not have the time to fully explore. ..." As to the Webb-Pomerene Act exemption, the Panel recommended that it should be retained and extended to cover services. The National Commission, itself, recommended that the exemption should be reexamined by the Congress.

Since the submittal of the Report of the National Commission, the debate over whether the antitrust laws impede our national export trade and over suitable remedies in this regard has continued without resolution. Some proposals have

been introduced in the Congress to enact an Export Trading Company Act of 1981, [2/] which would promote the formation of export trading companies, including a certification procedure which would confer antitrust pre-clearance. Counter-proposals have also been introduced, including one by the distinguished Chairman of this Committee, which seek instead to clarify legislatively the application of the antitrust laws to conduct involving exports. [3/] As I have previously testified before this Committee, I do not now favor these proposals because they represent at best a piece-meal approach to a wider, unitary problem, whereas the study envisaged by S. 432 for the international antitrust area as a whole will give us the opportunity, through a coherent and comprehensive review, to obtain a "roadmap" before we proceed. The Commission proposed by S. 432 would be well suited to make the objective and in-depth study that should be undertaken to, first, appraise the relationship of our antitrust laws to exports and, second, posit a remedial approach that resolves the export issue but is also integrated within our international antitrust philosophy as a whole.

We cannot credibly pursue an antitrust philosophy regarding U.S. exports which is at war with, or even oblivious of, our antitrust philosophy on the subject of imports. For

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[2/] S. 734 and H.R. 1648, 97th Cong., 1st Sess. §§ 101-08 (1981).

[3/] S. 795 and H.R. 2326, 97th Cong., 1st Sess. §§ 2-3 (1981).

example, if we are disposed to view joint export efforts by foreigners as unlawful cartels restraining our imports, we cannot expect sympathy or immunity abroad if and when we launch our own collective export programs. I am not suggesting that the problem of export cartels is an easy one: only that, since one nation's export trade is another nation's import trade, we must take care to shape a philosophy which is integrated and internationally defensible, as well as promotive of our national export interests.

The application of the United States antitrust laws to conduct abroad, particularly where the conduct is that of foreigners whose actions are in compliance with their national laws, has become a major subject of international controversy. While our oldest antitrust law, the Sherman Act, is almost 90 years of age, there still exists significant disagreement and uncertainty as to its appropriate jurisdictional sweep in the international context. Under the "effects test," articulated by Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), even conduct abroad by foreigners is subject to the Sherman Act if it has a sufficient effect on the interstate or foreign commerce of the United States. The "effects" doctrine is a particular point of contention at present between the United States and a number of foreign nations who maintain that it is inconsistent with international law. That this is a significant irritant in our international relations is evidenced by the fact that some of our closest allies have filed notes of protest and

enacted laws which "block" compliance with U.S. discovery orders and preclude the enforcement of certain U.S. antitrust judgments. The United Kingdom has enacted "clawback" legislation which enables certain parties to recover back in the British courts two-thirds of a treble damage award issued by a U.S. court against them.

Within the last few years, both the courts and the enforcement agencies have recognized that a serious problem indeed exists. A number of courts of appeals have held that the effects test "is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness." Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976)(emphasis in original); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979); Montreal Trading, Ltd. v. Amax, Inc., [1981-2] Trade Cas. (CCH) ¶ 64,328 (10th Cir. 1981). These courts and others have said that the jurisdictional issue must henceforth be approached in the international context by a weighing of a number of relevant factors. The present Assistant Attorney General in charge of the Justice Department's Antitrust Division too has recently indicated that, where transnational conduct is involved, the prosecutorial decision-making process will take into account foreign governmental interests and involvement, along with the competitive impact of the conduct on American markets and consumers. 4/

4/ Statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Before the Subcomm. on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, "Concerning International Aspects of Antitrust Enforcement," 5-6 (Nov. 19, 1981).

Nonetheless, serious, unresolved problems persist. The Timberlane "balancing" approach, while it has considerable theoretical appeal and justification, has not thus far proven satisfactory from the practical viewpoint. At the outset, a private practitioner like me must ponder how he can reliably counsel a client, in advance of litigation, about the likely resolution of jurisdictional issues based on a delicate and highly subjective weighing of ten or more pertinent considerations. Law loses much of its value to our society if its content is unpredictable and compliance therewith is difficult to plan. Moreover, the courts are themselves encountering difficulty as they grope to apply the Timberlane approach fairly and practicably in private damage cases where, of course, rights of litigants are raised and prosecutorial discretion is not involved. How, for example, are they to determine how much weight to give to considerations of international comity in determining whether to assume or to exercise subject matter jurisdiction over a private action?

The trial judge in the uranium antitrust litigation showed little affinity for the balancing approach when, in ruling on discovery issues, he rejected the contention that international comity required a balancing of the national interests of the United States and the foreign countries to determine which interests predominate. He stated:

> Aside from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test

> is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions. 5/

Foreigners, too, wonder how the United States judiciary can cope with issues that have a heavy diplomatic content and can successfully "balance" the United States' interests in antitrust enforcement with the important interests of another sovereign nation. The balancing exercise could be significantly abetted if the Executive Branch were to manifest the foreign relations interests of the United States by filing amicus curiae briefs in these private antitrust lawsuits, but so far the Executive Branch has often failed to appear and express its position, perhaps because these disputes have a political element from the domestic viewpoint (as important controversies tend to have). Consider, for example, the nonappearance of the United States Government in the private antitrust case brought against OPEC, despite the court's invitation in this regard. 6/ In another recent case, which was

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5/ In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

6/ International Assoc. of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

brought by an Australian group against American companies in the U.S. courts, to enjoin mining projects in Australia which had been approved by the Australian Government, the Executive Branch once again declined to express the pertinent foreign policy considerations to the court. 7/ Moreover, it is a comment on the present nebulous state of the law in the United States that these Australian plaintiffs sought to protect the Australian environment by bringing a case in the United States courts and pleading it as an antitrust action.

In sum, we now have a variety of possible jurisdictional tests and resolutions applicable to international antitrust matters in the various circuits. Since American and foreign businessmen must have more clarity in the law if they are to know how to comply with it, this is an area which the proposed Commission could fruitfully study. Another topic for study is how U.S. governmental antitrust enforcement policies and considerations of U.S. foreign relations can be effectively brought before the courts when they are pertinent to private antitrust lawsuits. Perhaps the Commission could consider the appropriate circumstances and mechanisms for U.S. Government participation in such litigation.

There are, in addition, a number of important questions involving the operation of our antitrust laws to activities which have been conducted, compelled, encouraged or approved by foreign governments. Enterprises owned or controlled by nation-states have themselves been emerging as major factors in world

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7/ Conservation Council of Western Australia v. Aluminum Company of America, 518 F. Supp. 270 (W.D. Pa. 1981).

trade. Some difficult issues are being posed in terms of the continued effectiveness and fairness of our antitrust laws:

(1) The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 et seq. provides that the sovereign immunity defense does not extend to the "commercial" activity of a foreign state or of an entity owned by it. But when are a government's actions in connection with its national resources "commercial" and when are they "governmental" in nature? Moreover, is a foreign government a "person" subject to the prohibitions of the antitrust laws?

(2) The proper scope of the "sovereign compulsion" defense deserves objective study. There seems to be relatively broad agreement that it should operate neither as a "loophole" to protect improper private business conduct, nor as an unduly formalistic doctrine that fails to take into account the realities for American businessmen operating overseas;

(3) The scope of the "act of state" defense in antitrust cases is equally vague today. At what point do the actions of foreign governments attain the level of "sovereign" acts for purposes of invocation of the defense? Of course, I am aware of Senator Mathias' introduction of S. 1434 which is relevant to this question.

It is true that our enforcement agencies and courts may eventually develop appropriate resolutions of these problems over time. But, at best, many years of uncertainty are likely to pass, if we do not give prompt national attention to these problems. The growing lack of uniformity in approach among

the various federal district courts and circuits is itself a cause for immediate concern. We must also find a way to integrate into a coherent whole our antitrust policy and our international relationships.

In this connection, we should, among other things, take a hard look at the structure of our Executive Branch insofar as it relates to these matters. The present approach, which is highly decentralized in the sense that there are many departments and agencies charged with a "piece" of the international antitrust puzzle, carries important benefits but also makes for fragmented policy-making in this area.

Thank you, again, for this opportunity to appear in support of this important legislative proposal.

Senator MATHIAS. Our final panel for the day will be Prof. Barry E. Hawk, of Fordham University Law School, and Mr. A. Paul Victor, the chairman of the International Trade Committee of the section of antitrust law of the American Bar Association.

Gentlemen, as with the other witnesses, your full statements will be reported as read and we will ask you to summarize them as briefly as possible.

STATEMENT OF PROF. BARRY E. HAWK, FORDHAM UNIVERSITY LAW SCHOOL, NEW YORK, N.Y.

Mr. HAWK. Thank you, Mr. Chairman.

It is a pleasure and an honor again to appear before you. It is always a delight to come and testify in favor of S. 432, as I did in support of S. 1010. At your request I have submitted, in addition to my written testimony, a very brief written summary of my testimony.

Therefore, unless you feel to the contrary, I will simply add one thought to my written summary, a thought which does not appear in the summary or the testimony. The thought concerns the issue of bundling or expanding the commission to include discussion of extraterritoriality or the jurisdictional scope of statutes in other substantive areas.

I may be going against the Pennsylvania Dutch tradition in which I was raised but I have serious doubts about the usefulness of bundling for several reasons, mostly along the lines that Ambassador Brewster suggested: One, I am not entirely confident that the issues are the same in the antitrust areas and in other areas; two, I am pessimistic that a commission, let alone the courts, can formulate a single operable legal rule which will govern the jurisdiction-

al scope of these various statutes; third and more pragmatically, I think there are other antitrust issues in addition to the jurisdictional issue which should be examined by the commission.

I suppose the possible danger is that if you expand the jurisdictional issue to include nonantitrust statutes, there may not be enough time left to discuss other antitrust issues. For example, I feel very strongly that another general area here which should be examined is the issue of private firm liability in connection with foreign government involvement. That is an issue that will remain a problem even if you limit jurisdiction, as you could have, for example, in the uranium litigation. That is just one example. Assuming jurisdiction, you still have these other defenses.

Senator MATHIAS. Of course, as you suggest, this could get to be something on the order of magnitude of the Brownell report if we load too much on it.

Mr. HAWK. Yes, sir.

Senator MATHIAS. Mr. Victor?

STATEMENT OF A. PAUL VICTOR, ESQ., CHAIRMAN, INTERNATIONAL TRADE COMMITTEE, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION

Mr. VICTOR. Thank you, Mr. Chairman.

It is a pleasure to be back here again before this committee. This time I am here as a representative of the section of antitrust law of the American Bar Association, of which section I am chairman of the International Trade Committee.

Just last month the antitrust law section again recommended establishment of the International Antitrust Study Commission in a report which analyzed the various legislative approaches being considered to reduce what some businesses are perceiving as uncertainty as to the application of the antitrust laws to their joint exporting endeavors. A copy of that report has been appended to my formal testimony and I hope it will be accepted for the record.

Senator MATHIAS. Your statement will be a part of the record.

Mr. VICTOR. Thank you, sir.

I will spend just a few minutes, if I may, summarizing that report because I think it highlights why we think this study commission is an idea whose time certainly has come. What we do in this report is analyze the series of hearings held before this committee and the House Monopoly Subcommittee and the Banking Committee concerning the various approaches to export trading problems and the role, if any, of antitrust concern.

The report synthesizes the views of various people and organizations who have testified before those committees, and it analyzes the debate which exists over whether or not the American export situation is healthy, or is deteriorating, relatively speaking. It also demonstrates the debate and the disagreement regarding what factors may be inhibiting improvements in export performance, and what the role of antitrust is with respect to those factors. It points out that the Commerce Department concluded that antitrust is a minor disincentive vis-a-vis the many others that exist.

On the other hand, the report recognizes that there is, in the minds of some, uncertainty as to what the effects test really is, and even though it appears relatively clear as to what the Justice De-

partment means by the effects test and what most courts perceive the effects test to be, some courts nevertheless have raised questions and have been willing to find antitrust jurisdiction where no showing of domestic effects has arguably been made. In any event, whether or not the nexus between antitrust uncertainty and export performance has been properly demonstrated, the report synthesizes the various views which exist and analyzes the case law to determine whether the scope of antitrust application to foreign commerce is in fact difficult to ascertain under the existing state of the law.

In the antitrust law section's view, we believe that although the effects tests formulations have differed somewhat in wording from that advocated by the Justice Department, nevertheless they are all closely akin to one another in substance. But the report recognizes that there is a perception of some American businessmen that the antitrust laws prohibit certain exporting activities, and that such perception has to be dealt with.

We all know that there have been at least two approaches to deal with those perceptions that have thus far been proposed this year, the Export Trading Company Act approach and the approach, which is represented by the Foreign Trade Antitrust Improvements Act of 1981.

The report concludes that the differences which those two approaches reflect over the facts, law and policy, indicate an ideal subject for the study commission's review before the Congress acts to resolve a problem which may or may not exist. The study commission would be excellently equipped, we think, to explore that kind of question in a dispassionate and objective fashion, and to make recommenations both as to policy considerations and also as to proposed legislation.

I might add that the report goes on to note that if in fact the Congress believes that it should go forward now, regardless of a study commission, and enact legislation relating to the export trading problem, the section of antitrust law clearly prefers the approach represented by S. 795 as distinguished from the Export Trading Company Act legislation.

In sum, we believe that the Commission could perform the highly beneficial function not only of examining the long agenda of important international law questions that Mr. Griffin—on behalf of the ABA—described earlier, but also of helping Congress decide the specific question of whether an antitrust-related problem truly exists with respect to America's export performance, and if one does exist, what the simplest, most prudent legislative remedy should be.

Thank you.

Senator MATHIAS. Thank you, Mr. Victor. Let me ask each of you, I gather that Professor Hawk disagrees with the ABA on the idea of an expansion.

Mr. HAWK. No, Mr. Chairman. I was earlier discussing only the question of extending the Commission's mandate to examine non-antitrust jurisdictional issues. I do not know as there is a firm ABA position on that.

Senator MATHIAS. I wanted to make it very clear as to exactly where——

Mr. HAWK. On the question of whether you should have a commission, or whether you should go forward with the Export Trading Act or something like S. 795, I agree entirely with the ABA's position that the Commission is preferable. I would go one step further than the ABA presently has in this:

One: I agree with the ABA that the Commission is preferable.

Two: If Congress feels that it must have legislation before a commission, I with the ABA would prefer something like S. 795 rather than the Export Trading Act.

Where I go the one step further is that even if you enacted the Export Trading Act and/or S. 795, I think there is a need for a commission. The Export Trading Act, if that were passed, is basically a modification of Webb-Pomerene. It is the tip of the iceberg of these problems. Frankly, I do not think it is going to have much effect on exports or imports one way or the other.

Senator MATHIAS. Treating symptoms and not causes.

Mr. HAWK. Exactly.

S. 795 is more far-reaching, in that it attempts to clarify or define jurisdiction, but again I think it treats only part of the problem. As Mr. Chairman's own bill on the act of state doctrine indicates, that doctrine is very relevant here, together with foreign sovereign compulsion and *Noerr* defenses; all those issues will not disappear entirely even if you redefine jurisdiction along the lines of S. 795. Application of antitrust to international transport, which is something I think the Commission should also look at, will not disappear with a redefinition of jurisdiction. Therefore, I think the commission is desirable even if this specific legislation is passed.

Mr. VICTOR. Mr. Chairman, may I add to that, or clarify it, if there was any confusion. The antitrust section indicates in its report that even if Congress were to adopt an approach as reflected in S. 795, or the Export Trading Company Act, we still would urge that a commission be established.

Senator MATHIAS. The Washington Post this week had an editorial which touched on this area. I do not know whether either of you happen to have seen it. The editors voiced some concern over the perceived effort of the Japanese Government to organize—and I am using the Post's words, now—an industrial monopoly to compete abroad. They had immediate reference to silicon chips.

How would the commission, do you think, approach this kind of problem? What sort of long-range policy changes could the commission conceivably bring about, if you give your imagination a free rein?

Mr. VICTOR. May I start? I did not see the article and I do not know anything in detail about the silicon chip industry, but it seems to me that the Japanese do have a law on their books—I think it is called the Export-Import Trade Act—which apparently does authorize certain kinds of joint activity with respect to exports, if that activity is approved by the Ministry of International Trade and Industry, and if that activity is approved by the Japanese Fair Trade Commission.

I think that statute is based upon our Webb-Pomerene Act, and it would seem to me that any study commission that is created would, and should, review what the status of that type of legislation is abroad, how that affects competition from foreign nations

into the United States, and where our laws ought to be in light of the fact that the realities of competition from other nations today.

Mr. HAWK. Mr. Chairman, I think that editorial illustrates very nicely another reason why a commission is essential. It touches on an international situation which requires us to do some rethinking about some very fundamental decisions:

One: To what extent is it in our national interest to desire competition in international trade?

Two: Assuming we want our firms to be competitive and we are going to impose liability on them when they violate our competition rules, how much should the rules change when in international trade, unlike in the domestic market, everyone is not playing by the same rules?

I think a commission is an excellent vehicle to discuss those kinds of very fundamental questions. Whether or not you end up with answers which require or suggest amendments to existing statutes, we ought to be thinking about them, and I think the Post editorial supplies a very good example.

Senator MATHIAS. It might be useful for those who are going to read this record if we put the Post editorial in the record at this point. I will ask the staff to do that.

[Post editorial follows:]

[Editorial from the Washington Post, Dec. 1, 1981]

CARS, CHIPS, AND JAPAN

Prime Minister Zenko Suzuki of Japan reorganized his Cabinet yesterday, apparently in the hope of reducing the friction with the United States over trade. Mr. Suzuki is only the latest in a long succession of Japanese politicians and diplomats to try to decide how seriously to take the perennial American complaints about a trade imbalance that is now very large and getting larger. Americans themselves give two very different answers.

American bankers and economists tend to reply that the trade deficit with Japan is not in itself terribly significant. A lot of the world's trade is triangular, and it's the total trade balance with all countries together that counts. For the past couple of years, this country's total trade deficit has been offset by the massive earnings American foreign investments, creating a satisfactory balance.

But American manufacturers, and American congressmen, usually take exactly the opposite view. Their companies and their constituents are under fierce competitive pressure from Japanese products. It simply isn't fair, they argue, to allow Japan almost unlimited access to the huge American market when American goods have such difficult and conditional access to Japan's.

The question of competition is worth pursuing. Even if both Japan and the United States were totally open to each others' goods, Japan would continue to run a substantial trade surplus. Japan must import all its oil, for example, and must earn the dollars to pay that bill. But the Japanese market is not totally open. By no means all of the barriers to imports are imposed by government policy. Sometimes it's a matter of deliberately dilatory resistance by Japanese officials at low levels. Sometimes it's the idiosyncracies of the Japanese consumer. It's open to question, for example, whether the American automobile companies could ever sell many of their cars in Japan. But there's no doubt at all about the difficulties of clearing a foreign car for sale in Japan.

An even more sensitive issue arises when the Japanese government appears to be organizing an industrial monopoly to compete abroad. Within the Reagan administration there is rising concern about the Japanese government's success in promoting the industry that makes integrated circuits—the silicon chips that are the nervous system of a computer—and ships them here.

Mr. Suzuki and his new Cabinet would probably be correct in concluding that American policy is not terribly sensitive to trade imbalances themselves, even when they are large. But it is quite sensitive to trade practices that are, in the American tradition unfair—and there, Japan is risking American reactions that can be dangerous to the economies of both countries.

NOT IN CONFLICT WITH THE U.N.

Senator MATHIAS. One final question before I let you go, a question that I have not raised with any of the other witnesses, is whether or not there is any redundancy between this proposed commission and the United Nations Committee on Trade and Development, which I believe does study and assess the international antitrust issues. Would this be in conflict with the United Nations or would it be helpful and supplementary to their work?

Mr. HAWK. Definitely not in conflict. The activities in the United States were focused on an entirely different set of issues than those to be studied by the commission; they were certainly not discussing fundamental questions such as those you just suggested in connection with the past editorial, that is whether it is in our national interest to have competition, et cetera.

Mr. VICTOR. I would say even if it were relevant, which it is not, it really should not inhibit Congress from establishing that commission so that we can explore in depth what our position as a Nation should be. That might indeed assist us in our ability to persuade other nations through the United Nations committee, toward a view of the antitrust laws that more comports with our own.

Mr. HAWK. I think the U.N. activities are relevant to the work of the commission. Clearly if you have a commission looking at the kinds of problems suggested, you would look at what the U.N. has done, international codes and what have you; but what they are doing is irrelevant to whether or not we should have a commission which decision is desirable and not made moot or redundant by the U.N. activities, either past or present.

Senator MATHIAS. Well, I think it is unlikely that that particular point will be raised in opposition to the commission but I thought it was useful to have something on the record that touches on it, in any event.

Well, I am very grateful to both of you and I will ask that you be willing, I hope that you will be willing to further help the committee as we follow this course.

Mr. HAWK. I would be delighted to, Mr. Chairman.

Mr. VICTOR. Yes, sir.

Senator MATHIAS. Thank you both very much.

The committee will now stand in recess, subject to the call of the Chair.

[Whereupon, at 1 p.m., the committee recessed, to reconvene at the call of the Chair.]

[Prepared statements and other pertinent material follow:]

Summary of Statement of Barry E. Hawk on S. 432
Before the Senate Committee on the Judiciary
December 3, 1981

I. Reasons for a Commission

A Commission is timely and necessary to provide a comprehensive, analytical and empirical reassessment of the application of U.S. antitrust laws to international trade becuase of the changed circumstances in international trade and the position of U.S. firms in that trade -- e.g. the increased importance of international trade to the United States; the growing demands for a more comprehensive and unified U.S. export policy; the exponential increase in enforcement of foreign competition laws, particularly in western Europe; the growing demands by developing countries for codes governing multinationals; and, last but perhaps most importantly, the increased involvement of U.S. firms with foreign governments and foreign state-owned or mixed enterprises.

II. Proposed Commission Agenda

A. General issues to be studied

1. relationship between antitrust and foreign economic policy
2. the role of foreign governments in international trade
3. impact of antitrust laws on U.S. export trade and on the competitive position of U.S. firms
4. conflicts with foreign governments arising from the application of U.S. antitrust laws
5. application of antitrust rules to international air and sea transport

B. Examples of more specific issues

1. legal defenses and doctrines arising in cases involving foreign governments - e.g. act of state doctrine, foreign government compulsion defense and the Noerr-Pennington doctrine
2. application of rules of reason (or per se) rules
3. relevant market definitions

III. A Commission is desirable even if the Export Trading Company Act (S. 734) or the Foreign Trade Antitrust Improvements Act (S. 795) is passed

A. A Commission is preferable for the reasons stated in the ABA Report

B. A Commission is desirable even if one (or both) of the other acts are passed

1. both acts address only part of the problem; the Export Trading Company Act is very narrow and deals with only the tip of the international antitrust iceberg; the so-called "generic" approach of S. 795, while broader in its intent and effect than S. 734, also fails to address many important issues -- e.g. private firm liability for conduct involving foreign governments where there is the requisite "jurisdictional" effect, conflicts with foreign nations, and international transport problems

2. many of the issues and concerns addressed by S. 734 and S. 795 are so closely related to issues not directly addressed that a comprehensive study by a Commission is desirable

3. A Commission is better able to gather the empirical data necessary for a confident resolution of the issues

4. neither the 1978 National Commission nor activities at the United Nations obviate the need for a new Commission to study international antitrust

My name is Barry Hawk. I am presently Professor of Law at University where I teach in the area of international antitrust and domestic antitrust, among others. I have written several law review articles and books on international antitrust, including the application of United States antitrust and related trade laws in foreign commerce. In 1978 I served on the Business Advisory Panel on Antitrust Export Issues to the National Commission for the Review of Antitrust Laws and Procedures. I am a member of the Council of the American Bar Association Antitrust Section and former chairman of the Antitrust Section's International Trade Committee. I am also a member of the State Department Advisory Committee on International Investment, Technology and Development. Finally, I took a sabbatical leave in 1980-81 to work with the antitrust authorities of the European Communities in Brussels.

The Senate Committee has kindly invited my views on S. 432 and I come in a purely personal capacity. The views expressed are my own and are not offered in my capacity as Council member of the ABA's Antitrust Section.

I thank the Committee for affording me the opportunity of commenting on S. 432 to establish a Commission on the International Application of Antitrust Laws. The effort to establish a Commission is an excellent and timely one, because there is need for a reflective in-depth and general reassessment - independent of any particular dispute of the application of United States antitrust and related laws in international trade. As I

previously testified in my support of S. 1010 during the last term of Congress, a reassessment is compelled by a number of new factors and changed circumstances in international trade and the position of the United States and U.S. firms in international trade. These new factors and changed circumstances include: the increased importance of international trade to the United States; the growing demands for a more comprehensive and unified U.S. export policy; the exponential increase in enforcement of foreign competition laws, particularly in western Europe; the growing demands by developing countries for codes governing multinationals; and, last but perhaps most importantly, the increased involvement of U.S. firms with foreign governments and foreign state-owned or mixed enterprises. These new facts or changed circumstances strongly support a Commission study and reassessment of a number of both very general and quite specific international antitrust issues.

I shall confine the remainder of my remarks to two general objectives. First, I suggest an outline of the more important issues which might fruitfully be studied by the type of Commission contemplated by S. 432. I should make the caveat, however, that my outline may be over-ambitious in including some very general issues whose complexity and breadth of national interests may make difficult subjects for study by an "antitrust commission." Second, I shall discuss the relationship of the proposed Commission study to other proposed legislation dealing with international antitrust, notably the Export Trading Company Act of 1981 (S. 734/H.R. 1648) and the

Foreign Trade Antitrust Improvements Act of 1981 (S. 795/H.R. 2326).

As to the Commission's agenda, there are a number of fundamental and inter-related issues which require comprehensive examination. First, there is the issue of the relationship between antitrust and foreign economic policy generally - for example, to what extent, if any, other national policies (such as balance of payments and national security considerations) override "antitrust" policies. A second issue concerns the increased role of foreign governments in international trade. A third issue concerns the overall relationship between the traditional "antitrust" laws (like the Sherman and Clayton Acts) on the one hand, and "unfair" competition laws (like section 337 of the 1930 Tariff Act and the antidumping laws) on the other. A related issue concerns the overlapping and sometimes inconsistent jurisdiction and enforcement in the international trade area among government agencies (notably, the Justice Department, the Federal Trade Commission and the International Trade Commission). Fourth, there is the issue whether the antitrust laws should be applied in the same manner in international trade as they are in purely domestic cases - for example, more lenient standards may be appropriate in the international context, such as a rule of reason analysis rather than a per se rule of unlawfulness. The fifth general issue is whether the antitrust laws have had an adverse impact on U.S. extort trade. This issue has generated considerable debate regarding, among other: concern that U.S. firms are

hampered in their efforts to compete in foreign markets by having to comply with stringent antitrust provisions to which their foreign competitors are not subject; the possibility of conflict between United States antitrust laws and foreign laws and policies, rendering it difficult for firms to comply with both; detrimental effects on United States foreign policy as a result of enforcement measures against foreign nations, including the potential threat of reprisals against U.S. firms; and the growing possibility that U.S. firms will be subject to antitrust challenges and penalties in several jurisdictions for the same conduct. Sixth, there is the issue whether the asserted uncertainty of the antitrust rules applicable in the foreign commerce area inhibit U.S. firms to the detriment of United States national interests. While I believe that this uncertainty and its inhibitory effect have been exaggerated, the Commission might perform a valuable service if only by clearing the air and laying finally to rest any doubt on the point. Seventh, recent and increasing foreign outrage at the application of U.S. antitrust laws in foreign commerce compel a study of methods of reducing such international conflicts. For example, consideration should be given to the establishment of institutional and procedural mechanisms to either obviate or resolve such conflicts. Finally, the application of antitrust rules to international air and sea transport should be examined by the Commission. International transport raises numerous issues and problems which directly and significantly touch on more general antitrust concerns not peculiar to the industries involved. For example, international conflicts and foreign government outrage have been particularly severe with

respect to the application of U.S. antitrust laws to international air and sea transport. It makes sense, therefore, to examine these two industries not in isolation but rather in the broader context of antitrust and foreign commerce.

The Commission could profitably address a number of more specific issues of significant practical import. For example, various defenses and legal issues arise in cases involving the involvement or participation of foreign governments and foreign state enterprises. As mentioned earlier, the increasing involvement of U.S. firms with foreign governments heightens the incidence and significance of these cases. Thus, the Commission might fruitfully examine the scope of the foreign compulsion defense, the act of state doctrine and sovereign immunity. For example, an important unresolved question is whether the foreign compulsion defense is limited to conduct compelled within the territory of the coercing foreign country. Another related defense which should be studied is the application of the Noerr-Pennington doctrine abroad.

Other examples of specific issues follow:

1. Whether a rule of reason analysis in the international area should include consideration of additional factors not existent in purely domestic cases - e.g., favorable impact on U.S. exports resulting from a restrictive arrangement

2. whether favorable consideration should be given to an arrangement's promotion of a firm's ability to compete in foreign markets - this issue is particularly relevant with respect to mergers and acquisitions
3. whether texts used to invalidate domestic mergers should be applied in the same manner to foreign take-overs of U.S. firms and to the acquisitions by U.S. firms of foreign companies - e.g., the potential competition theories
4. whether greater consideration should be given to broadening the definition of geographic market beyond the U.S. domestic market, particularly in merger cases under section 7 of the Clayton Act and monopoliz-tion under section 2 of the Sherman Act
5. whether the intra-enterprise doctine, under which a "conspiracy" can be found between related firms (such as parent and subsidiary), should be modified when applied to foreign commerce.

It should be recognized that not all the above issues may be capable of complete resolution by the Commission. The best example is the issue of the relationship between antitrust and other U.S. national policy concerns such as balance of payments and export promotion. Despite may own pessimism about the Commission's ability to resolve such a complex issue, I believe the issue must at least be addressed in order to provide some framework for the articulation and resolution of more specific

issues which more readily lend themselves to Commission study and recommendation.

Let me turn to the relationship between the establishment of a Commission and other antitrust legislation pending before the Congress, notably the Export Trading Company Act of 1981 (S. 734/H.R. 1648) and the Foreign Trade Antitrust Improvements Act of 1981 (S. 795/H.R. 2326). I shall not go into the details of this legislation, as the first two bills are the subject of detailed analysis by the Antitrust and International Law Sections of the ABA. I agree with the ABA position that the preferable course for the Congress to take is the creation of a Commission rather than enactment of the more specific legislation. I would go one step further and conclude that a Commission should be established even if the more specific bills are enacted. There are several reasons for this conclusion.

First, S. 734 and S. 795 deal with only part of the problems which arise in connection with the application of U.S. antitrust laws in international trade. The Export Trading Company Act is narrower in this respect, as it concerns only business arrangements in the export trade of the United States. To oversimplify somewhat, the Export Trading Company Act deals only with the problem of Webb-Pomerene associations or activities. In light of the numerous issues of serious importance outlined above, one can conclude that this bill deals merely with the tip of the international antitrust iceberg. The so-called

"generic approach" of S. 795 and H.R. 2326, under which the foreign commerce jurisdiction of the antitrust laws is clarified, is broader in its scope and effect than the Export Trading Company Act. Nonetheless, it also fails to address many of the fundamental and specific issues, including the following examples:

1. the liability of private firms for conduct involving foreign governments; this liability raises questions under the foreign government compulsion defense, the act of state doctrine and the Noerr-Pennington doctrine; neither S. 734 nor S. 795 would have an impact on cases in which U.S. firms engaged in practices involving foreign governments where those practices had a substantial effect on U.S. commerce or the U.S. domestic market (as plaintiff alleged in the Uranium Litigation);
2. the problem of the resolution or mitigation of international conflicts will arise even after S. 795's "clarification" of jurisdiction (again, the Uranium Litigation provides one example);
3. the application of antitrust to international air and sea transport and the conflicts with foreign nations resulting therefrom are not addressed (for example, the indictments and convictions in the North Atlantic shipping case);

4. the question of the relationship of the Sherman and Clayton Acts to other international trade statutes like the antidumping and countervailing duty laws is not addressed.

There are other examples, but I wish to merely emphasize here that the so-called generic approach embodied in the broader S. 795 certainly does not moot or render unnecessary the establishment of a a Commission.

A second reason supporting the establishment of a Commission is that many of the issues which S. 795 does address (such as the "territorial" scope of the Sherman Act) are intimately related to issues which are not or might not have been adequately addressed in the legislative decision to clarify the jurisdictional reach of the Sherman Act. Thus, a more extensive examination by a Commission should provide a more comprehensive analysis of the policy reasons for an amendment or clarification of the jurisdictional scope of the antitrust laws as well as a comprehensive analysis of an amendment's effects on other issues which were perhaps not adequately considered in the narrower context of simply defining jurisdiction in order to meet a legislative concern about the inhibitory impact of the antitrust laws on United States exports. I do not wish to exaggerate the extent of the inter-relationship among the issues arising in connection with the application of U.S. antitrust laws to international trade. International antitrust may not be a seamless web whose existence is shattered with the removal or alteration of a single thread. But its threads are connected to a significant decree and the resultant web is appropriately viewed by the

U.S. spider as promoting important national policies, while U.S. firms and foreign governments occasionaly voice justifiable concerns at their entrapment within the antitrust web.

A third reason supporting a Commission is its ability to gather empirical data. Such data is sorely needed before many of the issues outlined above can be resolved with any degree of confidence. For example, the Commission, as contemplated in section 5(d), might find it desirable to authorize the collection of such data. Indeed, while it is somewhat premature to judge, I would speculate that much of the Commission's work will lie in the initial formulation of problems and issues which can reasonably be addressed, followed by study and discussion of data in the form of reports rather than in the form of oral testimony at hearings.

Finally, it was suggested in prior hearings on S. 1010 that a Commission is unnecessary because of prior work by the 1978 National Commission for the Review of Antitrust Laws and Procedures and by United Nations activities. I heartily disagree. The only aspects of international antitrust examined by the National Commission were the Webb-Pomerene exemption (a thread of the web which many consider of de minimis importance) and ocean shipping. As to the UNCTAD activity and the United Nations activities generally, they bear little relevance to the issues which a U.S. Commission should examine.

In sum, a reassessment of the application of United States antitrust in foreign commerce is timely and necessary in order to provide continued assurance that the application of antitrust rules in international trade is rational and consistent with the general national interest of the United States and its citizens.

Thank you very much.

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STATEMENT OF

A. PAUL VICTOR, CHAIRMAN

INTERNATIONAL TRADE COMMITTEE

SECTION OF ANTITRUST LAW

AMERICAN BAR ASSOCIATION

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING S. 432,

THE "COMMISSION ON THE INTERNATIONAL APPLICATION

OF THE UNITED STATES ANTITRUST LAWS ACT,"

AND RELATED LEGISLATION

DECEMBER 3, 1981

Mr. Chairman and Members of the Committee, my name is A. Paul Victor. I am engaged in the private practice of antitrust and international trade law in New York, and am Chairman of the International Trade Committee of the American Bar Association's Section of Antitrust Law. I thank you for inviting me to participate in the debate concerning S. 432 and related legislative proposals.

Before I begin, let me note that I am not here today representing the ABA as a whole. That function is being performed most ably by my colleague, Joseph P. Griffin. His comments, which I endorse, reflect the official position of the ABA adopted last summer at the instance of both the International Law and Antitrust Sections.

Instead, I am here today as a representative of the Section of Antitrust Law, which, just last month, again recommended establishment of an international antitrust study commission in a Report analyzing alternative legislative approaches (represented by S. 734 and S. 795) to reducing some American businesses' reported uncertainty as to the applicability of the antitrust laws to their joint exporting endeavors. The Report stated:

> The Section of Antitrust Law believes that, in view of the major lingering questions about the extent and causes of any deficiency in America's export performance, and the broader questions about how best to reconcile the antitrust laws with America's trade and foreign policy interests, Congress should expeditiously establish a study commission

> and defer action for now on proposals to amend the antitrust laws.*/

It is primarily this recent Report of the ABA Antitrust Section that I would like to discuss today. If I may, Mr. Chairman, I would also like to submit a copy of the full Antitrust Section Report to this Committee for the hearing record.

I. Asserted Need for Legislation to Reduce Antitrust Uncertainty Concerning Export Trading.

Numerous representatives of business and government testified at Congressional hearings earlier this year that America's export position is deteriorating and that new legislation is needed to shore it up. In this connection, the Senate Banking Committee reported last March that:

> Although the ratio of exports to GNP rose from 4.2 percent in 1972 to 7.5 percent in 1979, U.S. imports, led by massive increases in the cost of oil, grew equally as fast, increasing in importance relative to GNP from 5.1 percent to 8.7 percent in the same years. Because imports have expanded since 1972 from a higher base than exports, the trade deficit has expanded sharply, with an aggregate deficit over the past five years exceeding $140 billion.**/

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*/ American Bar Association, Section of Antitrust Law, Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading 2 (adopted November 4, 1981) (hereafter "Antitrust Section Report").

**/ Senate Comm. on Banking, Housing, and Urban Affairs, Export Trading Companies, Trade Associations, and Trade Services, S. Rep. No. 97-27, 97th Cong., 1st Sess. 4 (1981) (hereafter "Senate Report on S. 734").

Other statistics, however, paint a brighter picture on the United States exports side. Thus, the Department of Commerce has reported that total United States exports of goods and services increased approximately $54 billion from 1979 to 1980, helping to produce an overall $7 billion trade surplus. Exports of services, in particular, remained strong, resulting in a surplus of over $34 billion in 1980. Also, United States agricultural exports increased 18 percent, and nonagricultural merchandise exports, 23 percent.*/ Figures such as these have led some participants in the current debate over export trade legislation to question claims that America's export performance is deteriorating.

Just as there is disagreement as to what marks the United States should be given for its export performance, there is disagreement as to what factors may be inhibiting improvements in that performance. For example, the Department of Commerce reported last year, on the basis of a comprehensive survey of exporters, trade associations, and Foreign Service posts, that "the major disincentives" to increased American

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*/ United States Dept. of Commerce, Bur. of Econ. Analysis, Survey of Current Business 40-67 (March 1981). The country's deficit in overall merchandise trade dropped from $29.4 billion in 1979 to $27.4 billion in 1980. That this deficit nonetheless remains high may be attributable in substantial part to the fact that petroleum imports increased 32 percent to almost $79 billion, accounting for one half of the total increase in merchandise imports in 1980. Id. In addition, the recent strength of the dollar relative to foreign currencies may have inhibited exporting and encouraged importing.

exporting "appear to be taxation of Americans employed abroad, uncertainties related to enforcement of the Foreign Corrupt Practices Act (FCPA), and export control regulations."*/ Disincentives found to be of lesser concern to exporters were environmental and safety regulations, antiboycott regulations, and the antitrust laws.**/

After holding hearings on ways to increase American exports, the Senate Banking Committee placed primary emphasis on spurring the development of export trading companies. The Committee attributed the paucity of such trading companies largely to the unavailability of sufficient incentives for banks to help finance them and to the lack of clear cut antitrust immunity for such companies' export activities.***/

A number of antitrust and international trade law specialists testifying before this committee and other Congressional committees earlier this year agreed that uncertainty as

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*/ Report of the President on Export Promotion Functions and Potential Export Disincentives 1-7 (1980). Taxation of foreign earned income was found to be "the disincentive of overriding concern to the exporting community." Id. at 1-8.

**/ With respect to the antitrust laws, the report stated:

> The extraterritorial reach of U.S. antitrust laws and their application to certain types of international transactions also concern exporters, but no specific instances were shown of these laws unduly restricting exports. Exporter uncertainties about the antitrust treatment of trading companies, however, could be a deterrent to the successful operation of such companies. [Id. at 1-9.]

***/ Senate Report on S. 734, supra at 5-7.

to the applicability of the antitrust laws has inhibited United States companies from engaging in a wide range of joint export activities.*/ These lawyers argue that the Justice Department's 1977 Antitrust Guide for International Operations states correctly that the United States antitrust laws should reach only those foreign commerce activities which have a "substantial and foreseeable effect" on United States domestic commerce. However, they assert, some federal district courts have been willing to find antitrust jurisdiction even where no such showing of domestic effects has been made and, hence, American exporters are uncertain as to the kinds of joint export-promoting activities they can engage in without incurring antitrust scrutiny.

By contrast, other antitrust and international trade law specialists at the same Congressional hearings questioned the asserted nexus between the country's export performance and apparent business uncertainty regarding the reach of the antitrust laws.**/ As summed up by William F. Baxter, Assistant Attorney General in charge of the Antitrust Division:

> Concern that joint export activities would violate the antitrust laws, or at least generate costly litigation, has been cited as a deterrent to such activities and as an inhibiting factor in export trade. . . . I

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*/ For references and quotations, see Antitrust Section Report, supra at 7-8.

**/ For references and quotations, see Antitrust Section Report, supra at 8-10.

> would like to repeat again the firm view of the Department of Justice that these concerns are largely unfounded . . . .

Still other antitrust and trade lawyers testified that economic and legal developments unrelated to ostensible antitrust uncertainties -- for example, the United States tax laws, inadequate government promotion of export activities, and an out-of-date industrial plant in some American industries -- are principally responsible for any perceived deficiency in America's export performance.

Faced with these differing views, the recent Antitrust Section Report analyzed the relevant case law to determine whether the scope of antitrust's application to foreign commerce is, in fact, difficult to ascertain under the existing state of the law.*/ The Report found that "while the 'effects' tests applied by the courts have differed somewhat in wording from the test advocated by the Justice Department, they are still closely akin to one another in substance."**/ But the Report went on to state that:

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*/ Id. at 10-21.

**/ Id. at 21. The Report added that "to the extent that the jurisdictional results reached in some of those cases are arguably somewhat inconsistent with current antitrust doctrine, this may be attributable in part to those courts' now less persuasive reliance on certain per se rules to decide both the merits and the jurisdictional issues, and their failure to undertake a comprehensive Timberlane [Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)] sort of balancing of foreign and domestic effects -- and, more generally, a balancing of United States interests with those of the foreign nation or nations involved." Id.

> Notwithstanding the potential for rationalizing the few arguably overexpansive decisions . . . , their existence -- even in the absence of any real uncertainty as to the "effects" test part of determining jurisdiction -- makes understandable the perception of some American businessmen that the United States antitrust laws prohibit certain exporting activities when, in fact, they very well may not. This perception of uncertainty may be sufficiently ingrained that some form of legislative relief may be a felt necessity by Congress.*/

II. Legislative Proposals and ABA Section of Antitrust Law's Recommendations.

To help reduce this perceived uncertainty, members of Congress have introduced bills reflecting two different remedial approaches. The first approach would amend the Webb-Pomerene Act**/ to authorize the Commerce Department to issue certificates to qualified exporters that would exempt them from antitrust liability for those exporting activities specified in the certificates. The other approach would amend the antitrust laws to clarify the wording of the "effects" test.

At the Congressional hearings earlier this year, many antitrust lawyers and others criticized the certification approach, which is taken by Title II of S. 734, the "Export Trading Company Act of 1981." The ABA Antitrust Section, in its recent Report, also opposed the certification approach, stating in part:

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*/ Id. at 22.

**/ 15 U.S.C. §§ 61 et seq.

> We have serious doubts whether the remedy for antitrust constraints (real or perceived) on joint export activity is to establish a new regulatory system in a non-antitrust agency, the Commerce Department, and to employ a new bureaucracy to implement it. Invocation of the certification procedure would take at least 3 to 6 months -- a substantial period of uncertainty in itself, which might discourage some firms from taking advantage of those export opportunities that require prompt action. The process would require companies to disclose development plans and other competitively sensitive information to the government -- a further possible deterrent. The certification procedure could also prove complicated, expensive, and burdensome to exporting companies and, in view of the provisions for comment by the public and other government agencies, a drain on government antitrust enforcement and trade promotion resources. Moreover, since S. 734 would place certifying and guideline-writing authority in the Commerce Department but enforcement authority in the Justice Department and the Federal Trade Commission, the bill would invite interagency conflicts. The resulting delay and inconsistent government policy could only further inhibit aggressive export trading.
>
> . . .
>
> In sum, Title II of S. 734 might ironically prove a deterrent to joint export activity by the small and medium-sized companies the legislation is designed to assist. As a form of economic regulation, it also appears to run counter to the Administration's strong desire for deregulation. We urge, therefore, that the approach embodied in Title II be rejected.*/

The alternate, generic-clarification approach is taken by S. 795, the "Foreign Trade Antitrust Improvements Act of 1981." This bill, introduced by the Chairman of this Committee, would primarily amend the Sherman Act to confine its

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*/ Antitrust Section Report, supra at 26-28.

reach over foreign commerce to conduct having a "direct and substantial effect on trade or commerce within the United States." Many of the witnesses at the recent Congressional hearings supported S. 795 and its companion bill, H.R. 2326, especially in comparison to Title II of the "Export Trading Company Act of 1981," as a more effective way to clarify the law for American exporters. The recent Antitrust Section Report likewise strongly favored the S. 795/H.R. 2326 approach, subject to certain amendments, stating:

> H.R. 2326 is intended, without changing the law substantively, to use the 1977 Justice Department Guide's wording to clarify the "effects" test to be applied in foreign commerce cases. It would thus afford American businesses -- especially the smaller firms -- increased assurance that their export activities, both joint and unilateral, would be protected from antitrust challenge as long as those activities affected foreign markets and not United States domestic or export commerce. Moreover, H.R. 2326 would accomplish this beneficial clarification of the law without creating -- as S. 734 would -- in a non-antitrust agency, a new economic regulatory program whose costly and time-consuming procedures, necessary information disclosures, and potential for interagency conflicts and court challenges might well deter individual businesses from seeking to benefit from it.
>
> In addition to reducing American exporters' uncertainty by clarifying the "effects" test, H.R. 2326 would also help allay the increasing concern of foreign nations that America's antitrust laws infringe on those nations' sovereignty.*/

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*/ Id. at 29-30, 31-34.

It is these differences over facts, law, and policy that the Antitrust Section believes the proposed international study commission would be excellently equipped to explore. Accordingly, the Antitrust Section resolved last month, when adopting the Report I have been referring to, that:

> pending enactment of legislation establishing a Commission on the International Application of the United States Antitrust Laws, as recommended by the American Bar Association at its Annual Meeting in August 1981 (such as S. 432 and the similar bill, H.R. 2459), and pending publication of the commission's report and recommendations, Congress should defer consideration of amendments to the antitrust laws limiting the application of those laws with respect to conduct involving foreign commerce (such as H.R. 2326 and its companion bill, S. 795) and legislation establishing an antitrust exemption and certification procedure for export trading companies and associations other than the procedure already established in the Webb-Pomerene Act (15 U.S.C. §§ 61 et seq.) (such as the procedure provided for in Title II of S. 734 and the similar bill, H.R. 1648).

The Antitrust Section further resolved that:

> if Congress nonetheless considers enacting any of the legislation described above before it creates the study commission described in Resolution 1, above, or before the commission publishes its report and recommendations, the Section of Antitrust Law of the American Bar Association recommends enactment of H.R. 2326 and its companion bill, S. 795, subject to certain amendments, and opposes enactment of those provisions of Title II of S. 734 and the similar bill, H.R. 1648, which would establish a new antitrust exemption and certification procedure for export trading companies and associations or any similar legislation.

In sum, the Antitrust Section believes that the study commission authorized by S. 432 could perform the highly beneficial function not only of examining the long agenda of important international law questions that Mr. Griffin described earlier, but also of helping Congress decide the specific question of whether an antitrust-related problem truly exists with respect to America's export performance and, if one does, what the simplest, most prudent legislative remedy would be.

Thank you for the opportunity to appear before you today. I would be happy to respond to any of your questions.

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October 26, 1981

AMERICAN BAR ASSOCIATION
Section of Antitrust Law

RESOLUTIONS

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

1. BE IT RESOLVED, that the Section of Antitrust Law of the American Bar Association recommends that pending enactment of legislation establishing a Commission on the International Application of the United States Antitrust Laws, as recommended by the American Bar Association at its Annual Meeting in August 1981 (such as S. 432 and the similar bill, H.R. 2459), and pending publication of the commission's report and recommendations, Congress should defer consideration of amendments to the antitrust laws limiting the application of those laws with respect to conduct involving foreign commerce (such as H.R. 2326 and its companion bill, S. 795) and legislation establishing an antitrust exemption and certification procedure for export trading companies and associations other

than the procedure already established in the Webb-Pomerene Act (15 U.S.C. §§ 61 et seq.) (such as the procedure provided for in Title II of S. 734 and the similar bill, H.R. 1648).

2. BE IT FURTHER RESOLVED, that if Congress nonetheless considers enacting any of the legislation described above before it creates the study commission described in Resolution 1, above, or before the commission publishes its report and recommendations, the Section of Antitrust Law of the American Bar Association recommends enactment of H.R. 2326 and its companion bill, S. 795, subject to certain amendments, and opposes enactment of those provisions of Title II of S. 734 and the similar bill, H.R. 1648, which would establish a new antitrust exemption and certification procedure for export trading companies and associations or any similar legislation.

3. BE IT FURTHER RESOLVED, that the Chairman of the Section or his designee is authorized to appear before the appropriate committees of Congress to present testimony in support of the above Resolutions and otherwise to communicate these Resolutions to such committees, their members, and others.

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1981-1982

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AMERICAN BAR ASSOCIATION
Section of Antitrust Law

REPORT TO ACCOMPANY RESOLUTIONS CONCERNING
LEGISLATIVE PROPOSALS TO PROMOTE EXPORT TRADING

I. Summary.

A number of trade experts have asserted that America's export performance has been deteriorating in recent years and have suggested that this country's antitrust laws are significantly to blame. More specifically, they have contended that American companies are uncertain about the application of the antitrust laws to export activities and that this uncertainty discourages the companies from entering and competing aggressively in export markets.

To help reduce such perceived uncertainty, two possible legislative remedies have been proposed. One, the "Export Trading Company Act of 1981" (S. 734 and H.R. 1648), would, in pertinent part, authorize the Secretary of Commerce to issue to qualified export trading companies and associations a certificate exempting them from antitrust liability for export activities specified in the certificate. The other major proposal, the "Foreign Trade Antitrust Improvements Act of 1981" (H.R. 2326 and

S. 795), would avoid a new regulatory certification procedure and amend the Sherman Act generically to confine its reach over foreign commerce to conduct having a "direct and substantial effect on trade and commerce within the United States."

Other trade specialists have questioned both whether United States exports are genuinely lagging and, if they are, whether amending the antitrust laws is really necessary to improve the situation. These observers have urged Congress to refrain from doing anything more at present than to establish a bipartisan commission to study the numerous questions relating to the application of the United States antitrust laws to international transactions. The ABA House of Delegates, at its annual meeting in New Orleans last August, adopted a resolution from the Section of International Law supported by the Section of Antitrust Law, supporting creation of such a study commission.

The Section of Antitrust Law believes that, in view of the major lingering questions about the extent and causes of any deficiency in America's export performance, and the broader questions about how best to reconcile the antitrust laws with America's trade and foreign policy interests, Congress should expeditiously establish a study commission and defer action for now on proposals to amend the antitrust laws. However, if Congress is inclined to take substantive action immediately, the Section favors adoption of the generic amendment to the Sherman Act proposal (H.R. 2326 and S. 795), with

certain clarifying changes, over the more cumbersome regulatory certification procedure to be administered by the Commerce Department by S. 734 and H.R. 1648.

II. Asserted Need for Legislation.

A. America's Export Performance.

Numerous representatives of business and government testified at Congressional hearings earlier this year that America's export position is deteriorating and that new legislation is needed to shore it up.*/ In this connection, the Senate Banking Committee reported in March 1981 that:

> Although the ratio of exports to GNP rose from 4.2 percent in 1972 to 7.5 percent in 1979, U.S. imports, led by massive increases in the cost of oil, grew equally as fast, increasing in importance relative to GNP from 5.1 percent to 8.7 percent in the same years. Because imports have expanded since 1972 from a higher base than exports, the trade deficit has expanded sharply, with an aggregate deficit over the past five years exceeding $140 billion.**/

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*/ See Export Trading Company Act of 1981: Hearings on S. 144 Before the Subcomm. on Int'l Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 1st Sess. (1981) (hereafter "Hearings on S. 144"); statements of Martin F. Connor, Esq., General Electric Co. (on behalf of the Business Roundtable), and others at hearings on H.R. 2326 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, Mar. 26 and Apr. 8, 1981 (hereafter "House Hearings on H.R. 2326"); statements of Howard W. Fogt, Jr., Esq. (on behalf of the Phosphate Rock Export Ass'n), and others at hearings on S. 795 before the Senate Comm. on the Judiciary, June 17, 1981 (hereafter "Senate Hearings on S. 795").

**/ Senate Comm. on Banking, Housing, and Urban Affairs, Export Trading Companies, Trade Associations, and Trade Services, S. Rep. No. 97-27, 97th Cong., 1st Sess. 4 (1981) (hereafter "Senate Report on S. 734").

Moreover, a study conducted by the National Association of Manufacturers in 1980 found that American imports of manufactured goods increased nearly four times as fast as exports since 1970. The study further found that the United States's share of world markets declined from 21.3 percent to 17.4 percent over the past 10 years, the largest relative decline among major industrial exporters. Finally, it observed that while America's manufactured goods trade has stayed in rough balance, Japan's and West Germany's reflected surpluses of $70 billion and $60 billion, respectively, in 1979.*/

Other statistics, however, paint a brighter picture on the United States exports side. Thus, the Department of Commerce has reported that total United States exports of goods and services increased approximately $54 billion from 1979 to 1980, helping to produce an overall $7 billion trade surplus.**/ Exports of services, in particular, remained strong, resulting in a surplus of over $34 billion in 1980.***/ In manufactured goods, the United States went from a $2.2 billion deficit in 1979 to a $12.5 billion surplus in 1980.****/ Finally,

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*/ Id.

**/ United States Dept. of Commerce, Bur. of Econ. Analysis, Survey of Current Business 50 (March 1981) (hereafter "1980 Survey").

***/ 1980 Survey, supra at 46.

****/ Remarks of the Hon. Peter W. Rodino, Jr., before the International Trade Seminar on "How to Export", sponsored by New Jersey Export Council, Ocean County College, and U.S. Department of Commerce, Toms River, N.J. (Oct. 2, 1981) at 1 (hereafter "Rodino Speech").

United States agricultural exports increased 18 percent, and nonagricultural merchandise exports rose 23 percent.*/ Figures such as these have led some participants in the current debate over export trade legislation to question claims that America's export performance is deteriorating.**/

B. Factors Inhibiting Improved Exports.

1. Major Export Disincentives.

Just as there is disagreement as to what marks the United States should be given for its export performance, there is also disagreement as to what factors may be inhibiting improvements in that performance. For example, the Department of Commerce reported last year, on the basis of a comprehensive survey of exporters, trade associations, and Foreign Service posts, that "the major disincentives" to increased American exporting "appear to be taxation of Americans employed abroad, uncertainties related to enforcement of the Foreign Corrupt

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*/ 1980 Survey, supra at 44. The country's deficit in overall merchandise trade dropped from $29.4 billion in 1979 to $27.4 billion in 1980. That this deficit nonetheless remains high may be attributable in substantial part to the fact that petroleum imports increased 32 percent to almost $79 billion, accounting for one half of the total increase in merchandise imports in 1980. Id. at 44-45. Representative Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, noted recently that in addition to the costly oil imports, America's balance of trade has been harmed by "the increasing value of the dollar relative to foreign currencies [which] has cut into exports and encouraged the import of many foreign made goods." Rodino Speech, supra at 1-2.

**/ Statement of John H. Shenefield, Esq., at 3, and statement of James A. Rahl, Esq., Professor of Law, Northwestern Univ., at 3-4, at House Hearings on H.R. 2326, supra; statement of A. Paul Victor, Esq., at 2-3, at Senate Hearings on S. 795, supra.

Practices Act (FCPA), and export control regulations."*/ Disincentives found to be of lesser concern to exporters were environmental and safety regulations, antiboycott regulations, and the antitrust laws. With respect to the latter item, the report stated:

> The extraterritorial reach of U.S. antitrust laws and their application to certain types of international transactions also concern exporters, but no specific instances were shown of these laws unduly restricting exports. Exporter uncertainties about the antitrust treatment of trading companies, however, could be a deterrent to the successful operation of such companies.**/

After holding hearings on ways to increase American exports, the Senate Banking Committee, in a report issued in March 1981, placed primary emphasis on spurring the development of export trading companies. The Committee concluded that such companies, "by diversifying trade risk and developing economies of scale in marketing, financing, and other export trade service, can do the exporting for large numbers of U.S. producers."***/ The Committee attributed the current paucity of export trading companies largely to the unavailability of sufficient incentives to banks to help finance export trading companies and to the

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*/ Report of the President on Export Promotion Functions and Potential Export Disincentives 1-7 (1980). Taxation of foreign earned income was found to be "the disincentive of overriding concern to the exporting community." Id. at 1-8.

**/ Id. at 1-9.

***/ Senate Report on S. 734, supra at 5.

lack of clear cut antitrust immunity for such companies' export activities.*/

2. Asserted Antitrust Uncertainty.

With respect to the antitrust aspects of this debate, a number of antitrust and international trade lawyers testified before Congressional committees earlier this year that uncertainty as to the applicability of the antitrust laws to conduct involving foreign commerce has inhibited United States producers from engaging in a wide range of joint export activities.**/ As noted by Howard W. Fogt, Jr., counsel to an export trade association, although the Justice Department's 1977 Antitrust Guide for International Operations and its 1980 Antitrust Guide Concerning Research Joint Ventures

> reflect a proper limitation on application of American antitrust laws to activities having a direct, foreseeable and substantial effect on U.S. domestic and import commerce . . . , the limited construction which the Justice Department has described has not always been

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*/ Id. at 5-7.

**/ E.g., statements of David N. Goldsweig, Esq., James R. Atwood, Esq., and Martin F. Connor, Esq., at House Hearings on H.R. 2326, supra; and statement of Howard W. Fogt, Jr., Esq., at Senate Hearings on S. 795, supra. Mr. Connor testified on behalf of the Business Roundtable that it is not difficult to pinpoint the general classes of business transactions "that are restricted by the threat of antitrust problems, from which that threat should be eliminated. These would include joint ventures or other arrangements among exporters that may involve the allocation of territorial responsibilities or the establishment of common prices or other terms of trade, technology licenses that restrict sales by the contracting parties to particular countries or regions, and offshore acquisitions that permit U.S. firms to enter foreign markets."

> followed by a number of lower courts in contexts where only minimal effects on U.S. interests are present.*/

In this connection, James R. Atwood observed that recent "expansive interpretations of the Sherman Act" by lower courts:

> leave American exporters in an unenviable position. They are worried that cooperative arrangements among themselves, intended to enhance the benefits from their export trade, might be subject to U.S. antitrust attack, not because of harmful effects in American markets or because of damage done to competing American exporters, but because of consequences felt in foreign markets by persons operating or buying abroad.
>
> . . . The vitality and profitability of U.S. export trade can easily suffer from the dampening effects of the uncertainty of current law. **/

By contrast, other antitrust and trade specialists at the same Congressional hearings questioned the asserted nexus between the country's export performance and apparent business uncertainty regarding the reach of the antitrust laws. Thus, William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, testified that:

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*/ Statement of Howard W. Fogt, Jr., Esq., at 17, at Senate Hearings on S. 795, supra. Mr. Fogt cited Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co., 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977), Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, modifying 375 F. Supp. 610 (E.D. Pa. 1974), and Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. 1978), together with a "but see" reference to National Bank of Canada v. Interbank Card Ass'n, 1980-81 Trade Cas. (CCH) ¶ 63,836 (2d Cir. 1981).

**/ Statement of James R. Atwood, Esq., at 4-6, at House Hearings on H.R. 2326, supra. Mr. Atwood cited the same cases as Mr. Fogt (see preceding footnote), as well as Pfizer Inc. v. Government of India, 434 U.S. 308 (1978).

> Concern that joint export activities would violate the antitrust laws, or at least generate costly litigation, has been cited as a deterrent to such activities and as an inhibiting factor in export trade. . . . I would like to repeat again the firm view of the Department of Justice that these concerns are largely unfounded . . . . */

In addition, Professor Robert Pitofsky stated:

> I would also emphasize that while there has been some relative decline [in America's foreign trade position], it is highly unlikely that antitrust enforcement is a principal factor. Many other explanations have been offered: tax laws, the elimination of a fixed monetary rate of exchange, an out-of-date industrial plant in some industries, the tendency of industrial managers to emphasize short-term over long-term profits, and an alleged decline in American product quality. I'm not sure which if any of these factors really has played a major role; I do suggest that if one were making a list, antitrust enforcement would appear as a rather minor consideration. **/

And A. Paul Victor, Chairman of this Section's International Trade Committee, testifying in his personal capacity, stated that:

> It is often claimed, in support of exempting export activities from the antitrust laws, that America's export position is deteriorating and that the antitrust laws are to blame. Solid documentation or other proof, however, rarely accompanies such assertions.
>
> By contrast, when one looks at the statistics, it appears that American exports are doing quite well. . . .

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*/ Statement of William F. Baxter, Esq., Assistant Attorney General, Antitrust Division, at 1, at Senate Hearings on S. 795, supra.

**/ Statement of Robert Pitofsky, Esq., Professor of Law, Georgetown University, at 2-3, at Senate Hearings on S. 795, supra.

Moreover, when one attempts to assess the role that the antitrust laws have played in deterring export activity, it does not appear to be significant.*/

3. Analysis of Foreign Commerce Cases.

Faced with those differing views, an analysis of antitrust foreign commerce cases would seem appropriate in order to determine whether the scope of antitrust's application to foreign commerce is, in fact, difficult to ascertain under the existing state of the law. An examination of such cases would seem to confirm that although, as a matter simply of wording, the "effects" tests they applied were not always identical to the one propounded by the Justice Department in its 1977 Guide, in substance the tests were, for the most part, applied quite similarly. Moreover, the jurisdictional results reached therein, even though on rare occasions somewhat expansive, can also, for the most part, be rationalized with the Justice Department's formulation of the "effects" test. Accordingly, any business uncertainty as to the applicability of the antitrust laws to foreign trade would seem to be an overreaction, for there is, with rare exception, no significant inconsistency between judicial precedents and the Justice Department's view of the "effects" test.

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*/ Statement of A. Paul Victor, Esq., at 2-3, at Senate Hearings on S. 795, supra. For other views, along similar lines, see statement of John H. Shenefield, Esq., at 3-4; statement of Eleanor Fox, Esq., Professor of Law, New York University, at 2; and statement of James A. Rahl, Esq., Professor of Law, Northwestern University, at 4-5, at House Hearings on H.R. 2326, supra.

In the 1945 Alcoa case, Judge Learned Hand concluded that the Sherman Act reached only those international transactions which both were intended to, and actually did, affect United States exports or imports.*/ Citing Alcoa and two subsequent Supreme Court decisions that cited that case,**/ the Justice Department's 1977 Antitrust Guide for International Operations stated the "effects" test as: "the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce . . . ."***/

The courts in recent foreign commerce cases have diverged somewhat from the Justice Department's wording in their phrasing of the requisite "effects" test. For example, one federal appellate circuit, citing Alcoa, applied an "intended effects" standard,****/ while three other circuits required only that certain effects be shown to have occurred, regardless of whether they were intended or foreseeable.*****/

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*/ United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945).

**/ Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704-05 (1962); Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

***/ United States Dep't of Justice, Antitrust Division, Antitrust Guide for International Operations 6 & n.13 (rev. ed. Mar. 1, 1977).

****/ In re Uranium Antitrust Litigation, 617 F.2d 1248, 1253-54 (7th Cir. 1980).

*****/ Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979); National Bank of Canada v. Interbank Card Ass'n, 1980-81 Trade Cas. (CCH) ¶ 63,836 at 78,471-72 (2d Cir. 1981).

In addition, while one court called for a showing of "a substantial effect on American foreign commerce,"*/ and another for a showing that the challenged conduct "directly affected the flow of commerce out of this country,"**/ other courts required showings that the conduct at issue had only "some effect on United States foreign commerce,"***/ "any appreciable anticompetitive effects on United States commerce,"****/ "anticompetitive effects in the United States,"*****/ or an "impact upon United States commerce."******/ And one lower court stated that "it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not de minimus."*******/

Perhaps more important than these variations in wording is the fact that the courts uniformly required that an

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*/ Mannington Mills, Inc. v. Congoleum Corp., supra 595 F.2d at 1292 (emphasis added).

**/ Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587, modifying 375 F. Supp. 610 (E.D. Pa. 1974) (emphasis added).

***/ Timberlane Lumber Co. v. Bank of America, supra 549 F.2d at 613, clarified in Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 428 (9th Cir. 1977).

****/ National Bank of Canada v. Interbank Card Ass'n, supra 1980-81 Trade Cas. (CCH) at 78,472.

*****/ Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Cas. (CCH) ¶ 62,378 at 76,257 (S.D.N.Y. 1978).

******/ Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co., 1977-1 Trade Cas. (CCH) ¶ 61,256 at 70,784 (S.D.N.Y. 1977).

*******/ Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979).

"effects" test of some sort be met. More specifically, it is clear in each of these cases -- either from the court's stated standard or from the result the court reached in the given circumstances*/ -- that a showing of something more than any effect on United States interstate, export, or import commerce would be required to establish subject matter jurisdiction. In this fundamental respect, the recent court decisions seem essentially consistent with the Justice Department's enforcement policy and with the state of the law generally, although courts and commentators may not always see eye to eye on what constitutes "substantiality" or "foreseeability."**/

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*/ In the recent Interbank Card case, for example, the Second Circuit's stated standard required only a showing of "any appreciable anticompetitive effects on United States commerce." That the appellate court was, if fact, applying a standard closer to the Justice Department's "substantial and foreseeable effects" test, however, is inferrable from its reversal of the district court for improperly basing its finding of subject matter jurisdiction on effects on American commerce that were too superficial. National Bank of Canada v. Interbank Card Ass'n, supra 1980-81 Trade Cas. (CCH) ¶ 63,836. See also Montreal Trading Ltd. v. Amax Inc., No. 79-1999, Antitrust & Trade Reg. Rep. (BNA) [Oct. 22, 1981] F-1 (10th Cir. Oct. 14, 1981).

**/ See e.g., American Bar Ass'n, Sec. of Antitrust Law, U.S. Antitrust Law in International Patent and Know-How Licensing 4-5 & nn. 16-18 (1981) ("The cases decided since Alcoa likewise recognize a need for limiting antitrust subject matter jurisdiction to something less than all conduct having any impact on American commerce. The approach generally taken . . . has been to make jurisdiction dependent upon whether the effect on U.S. commerce in each case is direct, substantial and reasonably foreseeable."); 1 P. Areeda & D. Turner, Antitrust Law 255 (1978) ("The central point, now well established, is that conduct, whether at home or abroad, can be reached by our antitrust laws when it affects competition within the United States or export competition from the United States."); J. Atwood & K.

[footnote continued on next page]

When one goes beyond the simple recitation of the chosen "effects" test, one finds evidence of the similarity of approaches in many of the recent opinions. Thus, many of the courts expressly relied in whole or in part on Alcoa, even if they ended up phrasing their own "effects" tests a bit differently.*/ Also, where a court omitted from its own threshold test certain elements of the Justice Department's "effects" test, it sometimes took them into account later in its analysis. For example, while the court of appeals in Timberlane required a threshold showing only of "some" (but not necessarily a "substantial" or "foreseeable") effect on United

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[footnote continued from preceding page]

Brewster, Antitrust and American Business Abroad 163 (2d ed. 1981) ("Where the conduct falls within the substantive scope of the Sherman Act and has some effect on United States commerce, the possibility of antitrust jurisdiction remains alive."); Restatement (Second) of Foreign Relations Law of the United States § 18 (1965) (substantial, direct, and foreseeable effect).

*/ See Montreal Trading Ltd. v. Amax Inc., supra Antitrust & Trade Reg. Rep. (BNA) [Oct. 22, 1981] at F-3; National Bank of Canada v. Interbank Card Ass'n, supra 1980-81 Trade Cas. (CCH) at 78,471; In re Uranium Antitrust Litigation, supra 617 F.2d at 1253; Mannington Mills, Inc. v. Congoleum Corp., supra 595 F.2d at 1291-92; Timberlane Lumber Co. v. Bank of America, supra 549 F.2d at 609-10; Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., supra 494 F. Supp. at 1183-84, 1189; Dominicus Americana Bohio v. Gulf & Western Industries, Inc., supra 473 F. Supp. at 687; Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., supra 383 F. Supp. at 587. Although the courts in Industria Siciliana Asfalti and Waldbaum did not discuss Alcoa, both cited as authority the district's earlier Todhunter-Mitchell case, which had relied on Alcoa. See Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co., supra 1977-1 Trade Cas. (CCH) at 70,784; Waldbaum v. Worldvision Enterprises, Inc., supra 1978-2 Trade Cas. (CCH) at 76,257.

States commerce, it announced that, as part of its later multifaceted balancing of comity considerations, it would weigh:

> the relative significance of the effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.*/

Similarly, in Dominicus Americana,**/ a case criticized by some witnesses at the recent Congressional hearings, and Zenith,***/ the courts declined to rely simply on a threshold test but instead, citing Timberlane and Mannington Mills, called for comprehensive jurisdictional inquiries in the course of which the extent and locus of the challenged conduct's effects could be weighed against other comity factors. Again, in point of fact, this is essentially similar to the Justice

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*/ Timberlane Lumber Co. v. Bank of America, supra 549 F.2d at 614. As the Zenith court described the Ninth Circuit's approach, "the substantiality of the effect on United States commerce was subsumed into the comity analysis as a factor to be balanced, rather than being a formulaic requirement of uncertain degree." Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., supra 494 F. Supp. at 1188. Similarly, in Mannington Mills, although the Third Circuit called for a showing of "substantial" effect in its threshold jurisdictional determination, it deferred consideration of the foreseeability of the effect until its overall weighing of comity considerations. Mannington Mills, Inc. v. Congoleum Corp., supra 595 F.2d at 1291-92, 1297-98.

**/ Dominicus Americana Bohio v. Gulf & Western Industries, Inc., supra 473 F. Supp. at 687-88..

***/ Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., supra 494 F. Supp. at 1189.

Department's approach in determining jurisdiction in the international sphere.

In addition, if one looks at the particular circumstances in which differently worded "effects" tests were applied in the four lower court decisions that have drawn the most criticism and raise the most concern -- Dominicus Americena, Todhunter-Mitchell, Industrial Siciliana Asfalti, and Waldbaum -- one could argue that the courts could have reached the same jurisdictional results had they been applying the standard adopted by the Justice Department in its 1977 Guide.

Thus, in all four cases, the courts focused on the challenged conduct's foreclosure of other United States companies' export opportunities:

> -- In Dominicus Americana, the complaint alleged a number of anticompetitive unilateral and conspiratorial actions by which the defendant American proprietor of a tourist resort in the La Romana section of the Dominican Republic delayed and disrupted the construction, local servicing, and marketing activities of a competing tourist resort which plaintiff American corporations were seeking to develop in the same area. While suggesting (without deciding) that the requisite showing of effects on American commerce had been made, the court declined to make a determination of subject matter jurisdiction until the parties could conduct discovery sufficient to permit a multifactor jurisdictional analysis under Mannington Mills and Timberlane.*/

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*/ Dominicus Americana Bohio v. Gulf & Western Industries, Inc., supra 473 F. Supp. at 684-86, 688.

-- In Todhunter-Mitchell, the court held not only that it had jurisdiction, but that defendant United States brewer had violated Section 1 of the Sherman Act when defendant sought to prevent plaintiff Bahamian beer distributor from competing with its exclusive distributor in the Bahamas by restraining two of defendant's independent United States wholesalers from reselling its beer to plaintiff.*/

-- In Industria Siciliana Asfalti, the court declined to grant defendant United States engineering firm's motion to dismiss for lack of subject matter jurisdiction where plaintiff Italian developer of an Italian oil refinery could establish that defendant had coerced it into agreeing to a reciprocal dealing arrangement. Under the arrangement, it was to purchase defendant's engineering services instead of the cheaper, "more advantageous" services of a competing United States engineering firm, and receive in return a favorable crude oil supply contract from defendant's sister corporation, Esso Italiana, a substantial supplier of crude oil for refining in the Italian market. The court stated that "the required impact upon United States commerce is supplied by the allegation that trade in the export of design and engineering services was restrained."**/

-- In Waldbaum, the court refused to grant defendant United States film licensor's motion for summary judgment on plaintiff South African private film library operator's claim that defendant's "block booking" tying arrangement in the rental of its films for showing in South Africa violated the Sherman Act. The court noted that it had been alleged that the tying

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*/ Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., supra 375 F. Supp. at 622-24, modified, 383 F. Supp. at 587-88.

**/ Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co., supra 1977-1 Trade Cas. (CCH) at 70,783.

> arrangement "has the effect of foreclosing other United States distributors from the market in South Africa which would be available if not for funds the plaintiff spent on the tied products."*/

Foreclosure of rival United States companies' export opportunities is just the type of effect on American commerce that the Justice Department's Guide would apparently find sufficient as a basis for jurisdiction.**/ Although we recognize that some might quarrel as to the "substantiality" of the foreclosure effects in the above decisions, they should at least not be characterized as de minimis. Moreover, one cannot help wonder whether the criticisms of at least Todhunter-Mitchell, Industrial Siciliana Asfalti, and Waldbaum would have been as severe if the plaintiffs had been either the Justice Department or the American company whose export opportunities were allegedly foreclosed rather than a foreign company whose business in a foreign market was allegedly injured.

We note that some witnesses at the recent Congressional hearings criticized these cases on the ground that they applied the United States antitrust laws to conduct whose

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*/ Waldbaum v. Worldvision Enterprises, Inc., supra 1978-2 Trade Cas. (CCH) at 76,255, 76,257-58.

**/ The Guide stated that one of the government's "two major purposes with respect to international commerce" is "to protect American export and investment opportunities against privately imposed restrictions." United States Dep't of Justice, Antitrust Division, Antitrust Guide for International Operations, supra at 5.

"primary" impact was on a foreign market.*/ This situation does not necessarily distinguish the "effects" tests, as applied in these cases, from the "substantial and foreseeable" formulation of the test set forth by the Justice Department in its 1977 Guide. The latter test does not require a showing that the adverse effect on United States commerce is "primary," or that it somehow outweighs either the effect on the foreign market involved or the challenged practice's purportedly "procompetitive" effect in promoting this country's position in foreign trade. That is not to say, of course, that some such balancing of domestic and foreign effects should not (and has not) become a standard part of courts' broader, post-Timberlane, jurisdictional determinations.

In addition, criticism of the jurisdictional analyses in at least Todhunter-Mitchell and Waldbaum may to some extent be a reflection of the dissatisfaction with those courts' holdings on the merits.**/ In both cases, the courts declared the challenged conduct unlawful on the basis of per se rules. As a result, the courts had no occasion to inquire significantly into the extent of the challenged conduct's

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*/ E.g., statements of David N. Goldsweig, Esq., at 4, at House Hearings on H.R. 2326, supra. See also statement of Martin F. Connor, Esq., at 5, at House Hearings on H.R. 2326, supra ("we see no reason why our laws should reach out to regulate transactions whose primary effects occur outside of our territory").

**/ The courts did not reach the merits in the other two recent lower court cases, Dominicus Americana and Industria Siciliana Asfalti.

anticompetitive effects on United States commerce; under a per se analysis, such effects were presumed. Adding to the critics' concern may have been the fact that the particular per se rule applied in Todhunter-Mitchell -- the Schwinn rule governing certain non-price vertical restraints*/ has since been discarded by the Supreme Court. Today such a case would probably be adjudicated under GTE Sylvania's rule of reason, quite possibly with different results.**/ Moreover, although the per se rule applied in Waldbaum has not been discarded,***/ that case may involve just the sort of conduct -- namely, a "block booking" tying arrangement having little demonstrated exclusionary impact on rival United States exporters -- which, in the foreign trade context, might well more appropriately be analyzed under the more flexible rule of reason.****/

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*/ 375 F. Supp. at 622, 624, citing United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

**/ See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), overruling United States v. Arnold Schwinn & Co., supra.

***/ 1978-2 Trade Cas. (CCH) at 76,257, citing United States v. Loew's Inc., 371 U.S. 38 (1962) (per se rule against "block booking" tying arrangements).

****/ Commentators have suggested that per se rules traditionally applied to particular types of domestic conduct should not automatically be applied to similar conduct in an international trade setting. See, e.g., 1 P. Areeda & D. Turner, Antitrust Analysis 268-69 (1978).

In a case study presented in its Antitrust Guide for International Operations, supra at 38-39, the Justice Department suggested that it might well not seek to invoke United States antitrust jurisdiction over a package licensing arrangement of the sort challenged in Waldbaum.

Finally, regardless of the actions taken by the four lower courts involved in the above discussed cases, it is clear from two even more recent decisions by appellate courts, Interbank Card and Montreal Trading, that where a plaintiff cannot show "more than a speculative and insubstantial effect on United States commerce," the courts will not hesitate to dismiss the case.*/

4. Perceived, If Not Real, Antitrust Problem

To summarize the above analysis, an examination of the antitrust foreign commerce cases reveals that, first, while the "effects" tests applied by the courts have differed somewhat in wording from the test advocated by the Justice Department, they are still closely akin to one another in substance. Moreover, to the extent that the jurisdictional results reached in some of those cases are arguably somewhat inconsistent with current antitrust doctrine, this may be attributable in part to those courts' now less persuasive reliance on certain per se rules to decide both the merits and the jurisdictional issues, and their failure to undertake a comprehensive Timberlane sort of balancing of foreign and domestic effects -- and, more generally, a balancing of United States interests with those of the foreign nation or nations involved.

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*/ Montreal Trading Ltd. v. Amax Inc., supra Antitrust & Trade Reg. Rep. (BNA) [Oct. 22, 1981] at F-3 (10th Cir. Oct. 14, 1981); National Bank of Canada v. Interbank Card Ass'n, supra 1980-81 Trade Cas. (CCH) ¶ 63,836 (2d Cir. 1981).

Notwithstanding the potential for rationalizing the few arguably overexpansive decisions discussed above, their existence -- even in the absence of any real uncertainty as to the "effects" test part of determining jurisdiction -- makes understandable the perception of some American businessmen that the United States antitrust laws prohibit certain exporting activities when, in fact, they very well may not. This perception of uncertainty may be sufficiently ingrained that some form of legislative relief may be a felt necessity by Congress. We turn now to a discussion of pending legislative proposals to deal with this perception.

III. Legislative Proposals and Section of Antitrust Law's Recommendations.

As noted above, members of Congress have introduced bills reflecting two different remedial approaches. The first approach would amend the Webb-Pomerene Act*/ to authorize the Commerce Department to issue certificates to qualified exporters that would exempt them from antitrust liability for those exporting activities specified in the certificates. The other approach would amend the antitrust laws to clarify the wording of the "effects" test.

In addition, although not mutually exclusive of these two approaches, legislation has also been introduced to create a blue ribbon commission to study in depth all aspects of the

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*/ 15 U.S.C. §§ 61 et seq.

antitrust laws' application to foreign trade and to report to the Congress whether any changes in the antitrust laws in fact seem warranted.

We set forth our views on these proposals in more detail below. In summary, however, the Section of Antitrust Law believes that a detailed expert study of the interplay of the United States antitrust laws with foreign trade would be highly beneficial, and it recommends quick passage of legislation, such as S. 432 and H.R. 2459, to establish such a study commission. If feasible, the Section also believes that it would be advisable for Congress to postpone consideration of H.R. 2326, S. 734, and similar antitrust legislation until after it receives the study commission's report and recommendations, since the case for immediate antitrust legislation to promote exports does not seem compelling.

If Congress is nonetheless determined to take some form of antitrust action now, the Section of Antitrust Law opposes enactment of S. 734's and H.R. 1648's certification procedure as a burdensome new form of government regulation that is unlikely to accomplish its goal of helping small American companies to enter the export business. Rather, the Section supports passage of H.R. 2326 and S. 795, with certain word changes, as a more acceptable approach to remedying any perception that the United States antitrust laws stand in the way of American businesses competing jointly or aggressively abroad.

A. Establishment of Certification Procedure

The "Export Trading Company Act of 1981," passed by the Senate this past April as S. 734, and introduced in the House as H.R. 1648, seeks to promote the establishment of export trading companies. Title I of S. 734 would make several changes in the banking laws to encourage more generous financing of export trading companies.*/ Virtually no opposition to Title I was voiced at the Congressional hearings earlier this year before the House and Senate Judiciary Committees. We take no position on whether the changes proposed are necessary or appropriate.

Title II, however, has been more controversial. It would, first of all, amend the Webb-Pomerene Act to extend from exportation of goods to exportation of services the limited antitrust exemption available to qualifying export trading companies and associations for certain joint exporting activities. In addition, to encourage the formation of export trade associations by providing them certain antitrust immunity, Title II would establish a new certification procedure to replace the

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*/ The Senate Banking Committee stated in its report that the bill would "afford financing incentives to encourage formation and growth of export trading companies, including existing export management companies; direct the Export-Import Bank to develop an improved guarantee program to support commercial loans to U.S. exporters; require the Secretary of Commerce to provide information to U.S. producers regarding export trading companies and other firms offering export trade services; and permit banks and banking institutions to make limited investment in export trading companies." Senate Report on S. 734, supra at 4.

existing one in the Webb-Pomerene Act. The bill would give the Secretary of Commerce the power to grant an exemption certificate to applicants meeting specified criteria. The certificate would list those activities for which the trade association or company would receive an exemption. A limited time would be given the Secretary to make his determination and in so doing he would be required to consult with the Justice Department and the Federal Trade Commission. If either objected, it could seek an injunction in a de novo court hearing to determine whether the qualifying criteria had been met.

During the time that a certificate would be in effect, the trade association or company would be exempt from antitrust liability for activities and methods specified in the certificate that were carried out in conformity with the terms and conditions prescribed by the Secretary. After a certificate were to take effect, either the Federal Trade Commission or the Justice Department would be authorized to bring a court action to revoke the certificate on the ground that the trade association's or company's activities had been outside the terms and conditions contained in the certificate. Private parties would not be authorized to bring such revocation actions.

At the recent Congressional hearings, although little criticism was aimed at S. 734's proposed extension of the Webb-Pomerene Act to exportation of services,*/ many antitrust

*/ This is a change which the National Commission for the Review of Antitrust Laws and Procedures recommended in its report to the President in January 1979. See Senate Report on S. 734, supra at 19.

lawyers and others criticized the certification procedure that Title II of S. 734 would establish.*/ We agree with that view and are opposed to enactment of Title II of S. 734.

We have serious doubts whether the remedy for antitrust constraints (real or perceived) on joint export activity is to establish a new regulatory system in a non-antitrust agency, the Commerce Department, and to employ a new bureaucracy to implement it. Invocation of the certification procedure would take at least 3 to 6 months -- a substantial period of uncertainty in itself, which might discourage some firms from taking advantage of those export opportunities that require prompt action. The process would require companies to disclose development plans and other competitively sensitive information to the government -- a further possible deterrent. The certification procedure could also prove complicated, expensive, and burdensome to exporting companies and, in view of the provisions for comment by the public and other government agencies, a drain on government antitrust enforcement and trade promotion resources. Moreover, since S. 734 would place certifying and guideline-writing authority in the Commerce Department but enforcement authority in the Justice Department and the Federal Trade Commission, the bill would invite interagency

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*/ E.g., statement of A. Paul Victor, Esq., at 6-7, at Senate Hearings on S. 795, supra; statement of Ky P. Ewing, Jr., Esq., Hearings on S. 144, supra at 340-43; statements of John H. Shenefield, Esq., at 12-13, Eleanor M. Fox, Esq., at 4-5, James R. Atwood, Esq., at 12-13, and James A. Rahl, Esq., at 13-14, at House Hearings on H.R. 2326, supra. See also 127 Cong. Rec. H779 (daily ed. Mar. 4, 1981) (remarks of Reps. Rodino and McClory).

conflicts. The resulting delay and inconsistent government policy could only further inhibit aggressive export trading.

Even if an American company (or group of companies) chose to submit to the cumbersome process and obtained a certificate, it might find that the certificate could not supply it with the protection it needed in the complicated, fluid environment of the international marketplace. For example, the certificate would shield the exporter from antitrust liability only for those activities specified in it. Thus, if a change in export opportunities or market conditions necessitated a modification in the nature or scope of the certificate holder's joint export activities described in its certificate, it would face the Hobson's choice of either proceeding with the modification and thus risking antitrust challenge or submitting to a lengthy new certification procedure.

Finally, by putting in place a complex apparatus for granting antitrust immunity to joint export endeavors, Title II of S. 734 might lead the courts, or at least some businessmen, to assume that joint export activities undertaken without a certificate would be fully open to antitrust challenge.*/

In sum, Title II of S. 734 might ironically prove a deterrent to joint export activity by the small and medium-sized companies the legislation is designed to assist. As a form of economic regulation, it also appears to run counter to the

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*/ See statement of James R. Atwood, Esq., at 12, at House Hearings on H.R. 2326, Supra.

Administration's strong desire for deregulation. We urge, therefore, that the approach embodied in Title II be rejected.

B. Generic Clarification of "Effects" Test.

Contrasting with S. 734's cumbersome certification procedure is the generic approach taken by the "Foreign Trade Antitrust Improvements Act of 1981." This bill was introduced in the House by Judiciary Committee Chairman Peter Rodino and Ranking Minority Member Robert McClory as H.R. 2326, and in the Senate by Judiciary Committee Chairman Strom Thurmond and Senator Dennis DeConcini as S. 795 [hereinafter referred to as H.R. 2326], and provides:

> Sec. 2. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:
>
> "Sec. 7. This Act shall not apply to conduct involving trade or commerce with any foreign nation unless such conduct has a direct and substantial effect on trade or commerce within the Unites States or has the effect of excluding a domestic person from trade or commerce with such foreign nation."
>
> Sec. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end thereof the following:
>
> "This section shall not apply to joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nation." */

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*/ H.R. 2326, 97th Cong., 1st Sess. (1981).

As Congressman McClory stated when he and Congressman Rodino introduced H.R. 2326:

> . . . This legislation will send to the export business community the clear signal that it appears to need in order for it to compete with greater confidence and freedom of action in the international marketplace, and it should also help to deter unjustified private and governmental actions against exporters. */

A number of the witnesses at the recent Congressional hearings supported H.R. 2326, especially in comparison to the "Export Trading Company Act of 1981," as a more effective way to clarify the law for American exporters.**/ We agree with this conclusion.

H.R. 2326 is intended, without changing the law substantively, to use the 1977 Justice Department Guide's wording to clarify the "effects" test to be applied in foreign commerce

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*/ 127 Cong. Rec. H779 (daily ed. Mar. 4, 1981) (remarks of Rep. McClory).

**/ E.g., statements of James R. Atwood, Esq., Eleanor M. Fox, Esq., and David N. Goldsweig, Esq. (Mr. Goldsweig discussing only H.R. 2326) at House Hearings on H.R. 2326, supra; statements of Robert Pitofsky, Esq., and A. Paul Victor, Esq., at Senate Hearings on S. 795, supra. See also statement of Ky P. Ewing, Jr., Esq., Hearings on S. 144, supra at 340-44. Other witnesses urged the conducting of an expert study of the international application of the antitrust laws before enactment of any substantive antitrust legislation, but nonetheless expressed a preference for the H.R. 2326 approach over the S. 734 approach. E.g., statement of John H. Shenefield, Esq., at House Hearings on H.R. 2326, supra; statement of Jay Angoff, Esq., at Senate Hearings on S. 795, supra.

cases.*/ It would thus afford American businesses -- especially the smaller firms -- increased assurance that their export activities, both joint and unilateral, would be protected from antitrust challenge as long as those activities affected foreign markets and not United States domestic or export commerce. Moreover, H.R. 2326 would accomplish this beneficial clarification of the law without creating -- as S. 734 would -- in a non-antitrust agency, a new economic regulatory program whose costly and time-consuming procedures, necessary information disclosures, and potential for interagency conflicts and court challenges might well deter individual businesses from seeking to benefit from it.

In addition to reducing American exporters' uncertainty by clarifying the "effects" test, H.R. 2326 would also help allay the increasing concern of foreign nations that America's antitrust laws infringe on those nations' sovereignty. By statutorily limiting the extraterritorial reach of those laws to conduct affecting either commerce "within the United

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*/ As Assistant Attorney General William Baxter testified concerning S. 795, H.R. 2326's companion bill:

> We understand that this bill is not intended to work any significant changes in the law, but rather to restate current enforcement policy and judicial interpretations governing the applicability of the antitrust laws to joint export activity. . . .

Statement of William F. Baxter, Esq., at 4, at Senate Hearings on S. 795, supra.

States" or the export opportunities of American companies, H.R. 2326 would signal clearly the limited objectives of the United States antitrust laws.

If Congress decides to enact H.R. 2326, the Section of Antitrust Law recommends the following wording changes, to improve the language and address legitimate concerns identified in comments made by various witnesses at the recent Congressional hearings.

With respect to the proposed amendment to the Sherman Act:*/

1. The phrase "direct and substantial effect" should be revised to add the concept of "foreseeability." This would bring H.R. 2326's effects test into line with the one stated in the Justice Department's 1977 Antitrust Guide for International Operations. The phrase should read: "direct, and substantial, and foreseeable effect."

2. The phrase "trade or commerce within the United States" should be revised to read: "trade or commerce within (including imports of goods or services into) the United States." The proposed parenthetical phrase would make clear that restraints on imports into the United States would remain subject to scrutiny under the United States antitrust laws (except to the extent that comity considerations might require otherwise).**/

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*/ In the following suggested wording changes, language to be deleted is hyphened out, while language to be added is underlined.

**/ See, e.g., Timberlane Lumber Co. v. Bank of America, supra 549 F.2d 597; United States v. Aluminum Co. of America, supra 148 F.2d 416.

3. The concluding clause "or has the effect of excluding a domestic person from trade or commerce with such foreign nation" should be clarified in the legislative history to ensure that "domestic person" includes all business entities operating in the United States, whether or not owned or controlled by United States-based entities. In addition, to eliminate the absolute nature of the "excluding" criterion and to make this export-commerce clause consistent with the more general preceding clause, the former clause should be amended to read, "or ~~has the effect of excluding~~ on a domestic person's ~~from~~ trade or commerce with such foreign nations."

4. Finally, some thought should be given to ensuring that H.R. 2326 does not inadvertently encourage the formation of foreign cartels injurious to United States consumers and commerce. A statement could be included in the committee reports accompanying the bill that it should not be construed to exempt from antitrust scrutiny United States firms' (or foreign firms') participation in any market division agreement which, while ostensibly covering only foreign markets, in fact has a direct, substantial, and foreseeable effect on commerce within the United States or on export commerce from the United States.

With respect to H.R. 2326's amendment to Section 7 of the Clayton Act, we suggest the following:

1. The opening language, "This section shall not apply to joint ventures," should be revised to read "This section shall not apply to the formation of joint ventures." This change would preclude the unintended interpretation that Section 7 of the Clayton Act was no longer to apply to an acquisition or merger -- otherwise subject to its terms -- where one party to the transaction was a joint venture involved in export trading. The proposed revision would also make clear that the activities of export-trading joint ventures, as

opposed to the creation of such joint ventures, would be subject to antitrust scrutiny to the same extent as other business entities' activities (namely, the extent defined in the proposed Section 7 of the Sherman Act).

2. The phrase "limited solely to export trading" might imply that joint ventures which purchase supplies or services in the United States for use in their export business or engage in other domestic activity incidental to that business would fall outside the proposed exemption. To avoid any such unintended construction, an appropriate explanation should be included in the committee reports accompanying H.R. 2326.

In both parts of the bill, the word "foreign nation" should be changed to "foreign nations," to conform to the antitrust laws' usual terminology.

The provisions of H.R. 2326, revised in the ways we have proposed, would read:

"Sec. 7. This Act shall not apply to conduct involving trade or commerce with any foreign nations unless such conduct has a direct, and substantial, and foreseeable effect on trade or commerce within (including imports of goods or services into) the United States or ~~has the effect of excluding~~ on a domestic person's from trade or commerce with such foreign nations."

"Sec. 3. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end ethereof the following: "This section shall not apply to the formation of joint ventures limited solely to export trading, in goods or services, from the United States to a foreign nations."

Aside from the above language changes, we recommend that both provisions of H.R. 2326 (with appropriate conforming language) be added to all of the antitrust laws and the Federal Trade Commission Act. This would achieve consistency in the enforcement decisions of the Justice Department, the Federal Trade Commission, and the courts and, in turn, increase business certainty regarding the impact of the antitrust laws on export activities.

Finally, if H.R. 2326 is enacted, we suggest that the Webb-Pomerene Act then be repealed as essentially unnecessary.

C. Creation of Study Commission.

As already noted, another legislative option under consideration is to create a bipartisan commission of legislators, executive branch officials, and private antitrust experts to undertake a comprehensive study of the many issues relating to the interplay of the antitrust laws and foreign trade. Bills to establish such a commission have been introduced in the Senate by Senator Charles Mathias (S. 432), and in the House by Congressman McClory (H.R. 2459). The ABA House of Delegates, at its annual meeting in New Orleans last August, adopted a resolution sponsored by the Section of International Law and supported by the Section of Antitrust Law that recommends to the President and Congress the establishment of just such a "Commission on the International Application of the United States Antitrust Laws." Since the various factors supporting

establishment of such a study commission and an agenda of issues for such a commission to consider have already been discussed in the resolution and accompanying report -- as well as in a recent report of the ABA Antitrust Section International Trade Subcommittee Task Force*/ -- they will not be discussed again here.

At Congressional hearings earlier this year, several witnesses expressed the view that action on either H.R. 2326 or S. 734 (or both), should be deferred pending establishment of the study commission and completion of its work. As put by John H. Shenefield in his testimony:

> The logic of studying a situation before enacting legislation is difficult to withstand. There clearly is a perception that confusion in the area has impeded export activity. An authoritative and comprehensive examination by experts could do much to illuminate the area.**/

Professor James A. Rahl, Mark R. Joelson, and A. Paul Victor, in their testimony, made similar recommendations.***/ As we have already noted, if Congress can see its way to following

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*/ ABA Antitrust Section International Trade Subcommittee Task Force, "Report on Bills to Establish a Commission on the International Application of the U.S. Antitrust Laws." (Mar. 26, 1981) (copy attached).

**/ Statement of John H. Shenefield, Esq., at 7, at House Hearings on H.R. 2326, supra.

***/ Statement of James A. Rahl, Esq., at 14-15, at House Hearings on H.R. 2326, supra; statements of Mark R. Joelson, Esq., at 1-3, and A. Paul Victor, Esq., at 4-5, at Senate Hearings on S. 795, supra. See also statement of Joel Davidow, Esq., at 8, at Senate Hearings on S. 795, supra.

such an approach, it would make eminently good sense.*/ If not, however, again, we support the "Foreign Trade Antitrust Improvements Act" (H.R. 2326) rather than the new certification procedure established by Title II of the proposed "Export Trading Company Act" (S. 734), and still urge creation of a study commission to examine the antitrust laws in effect at that time and how they relate to the international commerce of the United States.

A. Paul Victor
Chairman
International Trade Committee
Section of Antitrust Law

Daniel R. Barney
Member
Section of Antitrust Law

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*/ Antitrust courts dealing with foreign commerce cases have increasingly been wrestling with a significant array of difficult questions involving foreign policy issues, as well as economic and law enforcement considerations. See, e.g., Timberlane Lumber Co. v. Bank of America, supra 549 F.2d 597; J. Atwood & K. Brewster, Antitrust and American Business Abroad, supra at 159-81. While application of an "effects" test remains an important threshold element of the overall jurisdictional/comity determination, it is only one of a number of significant elements. Moreover, in many instances, the court's consideration of effects is necessarily interrelated with its consideration of the other jurisdictional elements. Different courts' somewhat varied handling of these complicated jurisdictional/comity determinations suggest that it is advisable to conduct an expert study of the full range of jurisdictional determinants, in hopes of arriving at a well-reasoned comprehensive remedy to American exporters' perceived uncertainty, before enacting specific amendments to the antitrust laws.

REPORT OF ABA ANTITRUST SECTION INTERNATIONAL TRADE SUBCOMMITTEE TASK FORCE

ON BILLS TO ESTABLISH A COMMISSION ON THE INTERNATIONAL APPLICATION OF THE U.S. ANTITRUST LAWS

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March 26, 1981

PROPOSED RECOMMENDATION

The Antitrust Section of the American Bar Association endorses proposed legislation that would establish a commission to study the international application of the U.S. antitrust laws. Such a commission would provide a needed forum for consideration of the proper place for antitrust enforcement activity and domestic competition policy values in the broader framework of U.S. international economic policy.

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REPORT

I. Introduction

On February 5, 1981, Senator Mathias introduced a bill to establish a commission to study the international application of the U.S. antitrust laws. The bill, S. 432, has been referred to the Senate Judiciary Committee. The bill is similar to that which the Senate unanimously passed last year.[1] On March 11, 1981, Rep. McClory introduced a bill in the House, H.R. 2459, substantially similar to S. 432.

This task force recommends that the ABA Antitrust Section endorse passage of this legislation because it would provide a needed forum for consideration of the proper place for antitrust enforcement activity and domestic competition policy values in the broader framework of U.S. international economic policy.

The bills would establish a commission to study the extra-territorial aspects of U.S. antitrust laws and their effect on U.S. firms' ability to compete overseas. Specifically, the commission is intended to provide a forum to examine the array of issues raised by the extraterritorial application of the U.S. antitrust laws, including their relationship to the laws of other nations and the steps that could be taken to promote competition policy values worldwide.

1/ Last year's bill, S. 1010, had over 20 co-sponsors in the Senate. See Congressional Record, February 5, 1981 at S1094-95.

The bills require the commission at the end of one year to publish findings and to recommend what changes, if any, should be made in U.S. antitrust laws, to ensure that they promote competition without handicapping U.S. business abroad and without causing offense to our trading partners. The bills grant the commission subpoena power.

Under the Senate bill the President would appoint the commission's 18 members. Four would be from the Executive Branch: the Vice President, the Assistant Attorney General in charge of the Antitrust Division, the Chairman of the FTC and the Legal Adviser of the State Department. Four would be from the Senate; four from the House. Six members would be from the private sector. The House bill requires that the members from the Executive Branch be the Vice President, the Attorney General and two others that the President has the discretion to appoint.

The bills require the commission to study the following international antitrust issues:

1. the application of the United States antitrust laws in foreign commerce, and their effect on:

   (a) the ability of United States enterprises to compete effectively abroad; and

   (b) the ability of United States enterprises to compete or deal effectively with foreign-controlled enterprises in market and nonmarket economies;

2. the effect of the application of the United States antitrust laws on United States relations with other countries;

3. the jurisdiction and scope of the application of the antitrust laws to foreign conduct and foreign parties;

4. the issue of reciprocity between nations with respect to mutual access to markets, equal opportunities for foreign investments, and enforcement of antitrust laws;

5. the application of United States rules of court relating to the enforcement of antitrust laws in the context of international transactions (for example, the "per se" and "rule of reason" doctrines); and

6. the application of the United States antitrust laws to joint ventures, mergers, acquisitions, and distributions and licensing arrangements between and among the United States and foreign based enterprises.

The sponsors of the bills seek their enactment as part of a broader effort that the federal government should take, in their view, to increase United States export activities, particularly in the area of removing what are often called "self-imposed disincentives to U.S. exports."2/ The context in which issues of U.S. antitrust policy arise, however, are broader than that. Consideration of U.S. antitrust policy raises political and economic questions fundamental to the nation. Antitrust policy is one of several major domestic policies, along with those relating to tax, trade, and environment, that affect the ability of United States enterprises to compete in domestic and foreign markets. In addition, antitrust plays a special role in that it is a primary medium for preserving our nation's commitment to a free market economy. Thus, questions pertaining to the relaxation of U.S. antitrust law in the international context

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2/ Congressional Record, February 5, 1981 at S1094.

will unavoidably implicate the broader question of the significance of antitrust values to the U.S. economy.

We must at this point note that the extraterritoriality issue itself is not limited to antitrust. The international application of U.S. anti-bribery, environmental, securities and other federal regulatory schemes raise similar concerns. These concerns, though properly beyond the scope of the inquiry of the proposed one-year antitrust commission, are likewise significant and thus merit serious public and Congressional debate.

The proposed legislation directs the Commission to study and make recommendations concerning three facets of antitrust jurisdiction: (1) the scope of the application of the antitrust laws to foreign conduct and foreign parties; (2) the effect of such application on the ability of U.S. enterprises to compete effectively abroad and at home; and (3) the effect of such application on U.S. foreign relations.

Three related factors have contributed to the need for a study of these extraterritorial jurisdictional issues. First, the scope of the application of U.S. antitrust laws to foreign conduct and foreign parties is unclear. Second, many American businessmen contend that, because the U.S. antitrust laws may apply to American firms' conduct outside the United States in the same manner as they apply to domestic conduct, American firms cannot compete effectively with foreign entities that are not subject to similar restrictions. Third, in recent years foreign governments have objected to specific instances of U.S.

assertions of antitrust jurisdiction to conduct outside the U.S. by their own nationals, arguing essentially that such assertions go beyond accepted standards of international law and are unwarranted intrusions into their fundamental economic policies.[3] In the following three sections of this report, we review each of these factors.

II. The Uncertainty as to the Scope of the Extra-territorial Jurisdiction of the U.S. Antitrust Laws

The lack of clarity as to the application of the U.S. antitrust laws to foreign conduct and parties arises from the fact that Congress created a very broadly-worded jurisdictional standard, i.e., any activity that affects U.S. interstate or foreign commerce, and left the task of applying this standard to the courts. Until the mid-1970s, the leading interpretation of the Congressional mandate was the Alcoa case, holding that a court had jurisdiction over conduct abroad by aliens if the conduct was intended to and did affect U.S. commerce.[4]

By the mid-1970s, courts began to hold that the Alcoa test was too simplistic or overbroad and that a number of factors must be considered in determining whether a U.S. court has juris-

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3/ The private federal court uranium cartel litigation, Westinghouse, Inc. v. Rio Algom, Ltd., 76 C. 3830 (N.D. Ill.), is one instance where foreign governments filed objections. The North American Liner Conference cases are another, United States v. Atlantic Container Line, United States v. Bates, Crim. Nos. 79-271, 79-272 (D.D.C., filed June 1, 1979).

4/ U.S. v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945) ("Alcoa").

diction and, if so, whether jurisdiction should be exercised. The most frequently cited list of factors to be considered in a "jurisdictional rule of reason" analysis illustrates the complexity of the issues involved:

1. Degree of conflict with foreign law or policy;

2. Nationality of the parties;

3. Relative importance of the alleged violation of conduct here compared to that abroad;

4. Availability of a remedy abroad and the pendency of litigation there;

5. Existence of intent to harm or affect American commerce and its foreseeability;

6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

8. Whether the court can make its order effective;

9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10. Whether a treaty with the affected nations has addressed the issue." 5/

5/ Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); see Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

Judges, enforcement officials and expert commentators have offered various views as to the weight to be assigned to each of the preceding ten factors and as to whether judges are capable of performing such an analysis. This confusion is increased by the uncertain parameters of the defenses to jurisdiction available in the international context such as the act of state doctrine or contained in the foreign sovereign immunity legislation.

As will be discussed further in the next section of this report, businessmen assert that this confusion hinders their ability to compete aggressively abroad. Moreover, they assert that even the possible application of U.S. antitrust laws to conduct outside of the United States handicaps the ability of American firms to compete with foreign firms.6/ For example, the American business community periodically suggests that American firms are prohibited from engaging in joint activities such as joint ventures or market allocation agreements while their foreign competitors can engage in such activities. Antitrust enforcement officials respond that businessmen have failed to prove such charges; these officials have also provided their

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6/ See Report of the President on Export Promotion Functions and Potential Export Disincentives (September 1980) at 9-18 through 9-25, submitted to Congress under Section 1110(a) of the Trade Agreements Act of 1979, P.C. 96-39. In particular, the President's Report concludes, that the mere "uncertainty about the application of the antitrust laws to these [international] transactions, however, may cause businesses to abandon or limit questionable transactions which would not be undertaken if the antitrust risk were more clearly perceived" (Id. at 9-18).

views as to the application of the antitrust laws in the inherently complex international context.7/

III. Extraterritorial Application of U.S. Antitrust Law as Potentially Inconsistent with U.S. Trade and Investment Goals

In recent years, it has been repeatedly asserted that U.S. antitrust laws may operate in a manner inconsistent with U.S. trade and investment goals. Allegations have been made that in some circumstances either the antitrust laws, or a widespread misperception of these laws, have hindered the development of U.S. export trade, discriminated against U.S. private enterprise in its efforts to deal and compete with foreign state controlled and subsidized commercial entities, impeded foreign investment in the United States, and, as will be discussed more fully in the next section of this report, contributed to a disruption of good trade and investment relations with our major trading partners. Such concerns are sufficiently widespread to warrant a comprehensive review of the antitrust laws to examine those aspects which may be inconsistent with our national economic goals. Here we review a few major areas of concern.

7/ See generally Justice Department, Antitrust Guide for International Operations (1977); see also Justice Department Antitrust Guide Concerning Research Joint Ventures (1980), particularly case C, seeming to discourage on antitrust grounds the use of a joint research venture between two major U.S. competitors, which was instituted to meet the threat of foreign competition.

A. United States Antitrust Laws May Disadvantage U.S. Businesses in Competition with Foreign Enterprises

United States businesses have repeatedly complained that U.S. antitrust laws restrict the ability of U.S. enterprises to compete overseas with foreign entities. Certain factors now commonplace in the international economy appear to make it increasingly difficult for American businesses to operate successfully abroad within the current parameters of U.S. antitrust law. These factors include, among others, increased cartelization of foreign producers and enterprises, expanded control of commercial enterprises by foreign governments, and the absence in foreign countries of meaningful antitrust laws restraining anticompetitive conduct.8/

Thus, U.S. businesses, unlike their foreign private competitors, may be prevented under the antitrust laws from undertaking certain activities in foreign markets. U.S. businesses wishing to equalize their bargaining position by engaging in certain, arguably pro-competitive collective activities, such as joint ventures, may frequently be deterred from doing so because of fears they might incur antitrust liability. Although Justice Department officials have issued a number of statements characterizing certain forms of joint venture activity as not violative

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8/ In this connection the commission should also consider what effect, if any, multilaterial negotiations and accords on antitrust and trade rules and guidelines have on U.S. economic interests. E.g., the coverage of the proposed UNCTAD Code on Restrictive Business Practices merits commission attention; United Nations Document TD/RPB/CONF/10 (1980).

of the U.S. antitrust laws (see, e.g., Justice Department Antitrust Guide for International Operations ("Antitrust Guide", page 19-32), substantial uncertainties remain.9/ The Justice Department's Business Review Procedure, which may be useful in clarifying the U.S. government's attitude toward particular fact situations, does not in and of itself insulate conduct from private antitrust challenge.

The disadvantage to U.S. private business particularly vis-a-vis foreign government enterprise is even more pronounced. U.S. private business operates with U.S. antitrust constraints on its own conduct. Foreign government enterprise is immune from antitrust liability unless the activity complained of does not have political attributes but is only purely commercial. International Association of Machinists and Aerospace Workers ("IAM") v. The Organization of the Petroleum Exporting Countries ("OPEC"), 1979-2 Trade Cas. ¶ 62,868 (C.D. Cal. 1979). Moreover, a foreign state can sue private U.S. competitors for antitrust

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9/ The United States has long asserted its jurisdiction to challenge foreign joint ventures or other arrangements of U.S.-based multinational enterprises abroad. See, e.g., Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). It has challenged the establishment both in the United States and abroad of joint manufacturing or research and development operations sponsored by a U.S. and a foreign company. See, e.g., United States v. Monsanto Company, Farbenfabriken Bayer A.G., 1967 Trade Cas. ¶ 74,530 (D. Del. 1973), United States v. Minnesota Mining & Mfg. Co., supra; see also Justice Guide, supra, cases D and E, at 23-32; Justice Department, Antitrust Guide to Research Joint Ventures, 1980, at 11 ("Industry-wide research projects that include many or all firms in a line of commerce, as well as projects involving the dominant firm or firms in an industry pose antitrust concerns.")

violations. Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978).

The extent and impact of these disadvantages to U.S. business should be reassessed.10/ The issue whether unequivocally to exempt from antitrust liability certain forms of collective U.S. business activity abroad, particularly where adverse consequences to U.S. consumers are either minimal or nonexistent, deserves careful analysis.

The pervasive involvement of foreign governments in the economic affairs of their industries often enables firms in a foreign country or in an economic union to engage in joint activity, e.g. "rationalization" of production and marketing affecting not only foreign markets but also U.S. markets, that U.S. firms are unable to do because of the prohibitions of U.S. antitrust law. The commission should also consider whether the U.S. antitrust laws should be modified to permit similar rationalization, not only with respect to the U.S. export trade but to U.S. firms' ability better to compete in the U.S. market.

In this context, it should also consider whether U.S. antitrust law, particularly that relating to mergers and joint ventures, needs to be modified. Currently, if mergers or joint ventures undertaken by U.S. firms essentially as a defense

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10/ The Export Trading Company bills, S. 734, H.R. 2123 and H.R. 1799, attempt to address this issue from the standpoint of export trading companies, but do not reach broader issues relating to facilitating competition by U.S. enterprises with foreign ventures and cartels.

against actual or threatened foreign competition produce substantial adverse effects on even one product or geographic sector of the U.S. economy, they are proscribed. The commission should consider whether U.S. antitrust law should not be revised to permit greater opportunities for consideration of these realities as part of the judicial and administrative antitrust evaluation process.11/

B. Application of the Antitrust Laws To the Extraterritorial Operations of U.S. Firms Can Cause Them to be Subject to Conflicting Legal Standards.

There may also be a need to reexamine and clarify the U.S. antitrust laws in terms of their impact on U.S. businesses operating overseas. U.S. enterprises operating abroad are frequently themselves subject to the conflicting legal requirements of United States antitrust law, on the one hand, and directives and policies of the foreign host country, on the other. As a result, U.S. businesses are being confronted with a choice of risking antitrust liability under U.S. law or of foregoing business opportunities in foreign countries where certain anticompetitive conduct may be required or encouraged by the foreign state.

11/ Similar broad concerns arise with respect to when and under what conditions patent or know-how licensing agreements involving U.S. firms can properly contain geographic, field-of-use, grant back and other restrictions on licensee behavior. The commission should, therefore, consider whether U.S. antitrust law is, or is perceived to be, an undue disincentive to "exports" of technology.

Although it is a recognized tenet of U.S. antitrust enforcement that the U.S. antitrust laws where applied overseas should avoid unnecessary interference with the sovereign interests of foreign nations, see Justice Guide, pp. 6-7, the antitrust laws have in the past been applied in ways, which it is alleged, have intruded upon significant foreign interests. See Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962); United States v. Gulf Oil Corp., Criminal No. 78-123 (W.D. Pa. 1978). In re Grand Jury Investigation of Shipping, 186 F. Supp. 298 (D.D.C. 1960). As will be discussed further, such extra-territorial enforcement of U.S. antitrust law has provoked adverse reaction and retaliation by some our closest trading partners.

To reconcile these competing U.S. and foreign interests, the courts in the past have applied a variety of doctrines and defenses, including the foreign sovereign compulsion defense, Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 949 (S.D.N.Y. 1968), aff'd 407 F.2d 173 (2d Cir. 1968), cert. denied, 395 U.S. 922 (1969), the act of state doctrine, Hunt v. Mobil Oil Corp. 550 F.2d 68 (2d Cir. 1977), comity, Timberlane Lumber Co. v. Bank v. America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), and sovereign immunity, IAM v. OPEC, supra. The boundaries of these defenses are in many cases imprecise, and case-by-case application may entail significant risks for U.S. enterprises and for U.S. trade relations generally. There is need for an attempt to clarify on a

comprehensive basis the issue of the extraterritorial reach of U.S. antitrust laws in a way which does not abandon antitrust enforcement, which will provide greater predictability to U.S. businesses operating abroad, and for reasons to be discursed, which will also reassure U.S. trading partners.

A particularly sensitive problem arises for U.S. business in connection with the scope of the foreign sovereign compulsion defense. Generally, where a foreign government as sovereign compels by force of law a private party to engage in conduct otherwise prohibited under U.S. antitrust law, U.S. courts have taken the position that the private party is not subject to antitrust liability. See Interamerican Refining Company v. Texaco Maracaibo, supra. Absent compulsion (generally taken to require a formal decree, order or law), however, compliance with foreign government encouragement or recommendations or generally accepted foreign business practice would not preclude antitrust liability, see United States v. The Watchmakers of Switzerland Information Center Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962). 12/ This would be the case even in situations where failure to act in accordance with the foreign government policy

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12/ See also February 21, 1981 letter from Attorney General William French Smith to United States Trade Representative William E. Brock. ("Generally speaking, an agreement among foreign private companies to reduce the number of automobiles they export to this country would most likely violate United States antitrust law. However, we believe that if such an agreement were formally mandated by a foreign government, the formal mandate would provide a defense to any subsequent antitrust challenge. In such litigation, the degree of foreign governmental involvement would be a key issue.")

or practice would effectively preclude the U.S. enterprise from doing business within the territory of that foreign state.

Moreover, agreements in restraint of commerce between foreign states and private U.S. parties viewed as voluntarily entered into may in practical economic terms not be voluntary at all. See U.S. v. Bechtel Corp., 1979-1 Trade Cas. ¶ 62,430 (N.D. Cal. 1979). Such difficult choices appear to call for a reexamination of the extraterritorial reach of U.S. antitrust law where private parties engage in anticompetitive conduct abroad pursuant to directives or policies of a foreign state.

C. Application of U.S. Antitrust Law May Discourage Foreign Investment in the United States.

United States antitrust law may proscribe acquisitions not only in situations where both parties to the transaction are domestic companies, but also where one or both parties to the transaction are foreign owned or controlled, and/or in certain circumstances even where one or both parties are themselves located abroad. Under present law, the test of lawfulness is unrelated to the nationality or location of the parties. The key factor is the competitive effect on U.S. interstate or foreign commerce. The ease with which U.S. courts have asserted jurisdiction over foreign enterprises in these circumstances may tend generally to discourage investment by foreign enterprises in the United States although there are no empirical examinations of this possibility.

The acquisition either of a foreign firm by a United States firm, or of a U.S. firm by a foreign firm, may be challenged even when the foreign firm does not compete or otherwise sell into the U.S. market. See United States v. Joseph Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal. 1966), aff'd per curiam, 385 U.S. 37 (1966), rehearing denied, 385 U.S. 1021 (1967) (acquisition by U.S. beer company of a Canadian brewer), British Oxygen Co., Ltd., 86, F.T.C. 1241 (1975), rev'd 557 F.24 (2d Cir. 1977) (acquisition by a British manufacturer of industrial gases of an American firm manufacturing similar products). A merger between two foreign corporations, where there may be a competitive impact on U.S. commerce, may also be subject to antitrust challenge, see United States v. Ciba Corp., 1970 Trade Cas. ¶ 73,269 (S.D.N.Y. 1970) (consent degree) (the Department of Justice challenged the merger of the worldwide operations of two Swiss pharmaceutical and chemical companies each of which owned a U.S. subsidiary).

IV. Extraterritorial Application of U.S. Antitrust Law to Foreign Enterprises as a Cause of Conflict with the Fundamental Economic Policies of Important U.S. Trading Partners

In recent years, the U.S. government has filed antitrust cases challenging the legality of the uranium and ocean shipping cartels, as well as other instances of activity abroad encouraged and approved by foreign governments. A result of these challenges has been some increase in international tensions. For example, six foreign governments filed papers in the uranium cartel cases protesting U.S. assertions of jurisdiction. These

foreign governments typically contend that such assertions of jurisdiction violate international law and/or fail to give due weight to considerations of international comity.

In some situations where the U.S. Government has chosen not to assert jurisdiction over foreign firms, e.g., the OPEC and Uranium cartel cases, private parties have brought treble damage suits for huge amounts. Moreover, several courts have either disregarded entirely or given little weight to protests concerning U.S. jurisdiction made by foreign governments. Consequently, within the past few years, a number of America's closest allies have enacted statutes designed to thwart discovery orders issued by U.S. courts, to prevent the enforcement of antitrust judgments issued by U.S. courts, and to "clawback" antitrust damages awarded by U.S. courts.13/

The essential reason for the complaints of foreign governments is that extraterritorial application of U.S. antitrust law

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13/ The uranium cartel private litigation triggered in the United Kingdom the "Protection of Trading Interest Act of 1980," which in certain circumstances prohibits compliance by British persons with U.S. antitrust decrees affecting enterprise within the United Kingdom. The Canadian "Foreign Proceedings and Judgments Bill" introduced into the Canadian Parliament on July 11, 1980, would prevent the enforcement of foreign antitrust judgments in Canada when, in the opinion of the Attorney General of Canada, such action would harm Canadian international trade and commerce. BNA Daily Report for Executives A-14 (July 22, 1980). Another instance of retaliation comes from Australia. Foreign Antitrust Judgments (Restriction of Enforcement) Act of 1979, No. 13, Austl. Act (1979). In May, 1980, 41 British Commonwealth nations passed a resolution encouraging all members of the Commonwealth to pass legislation curtailing the extraterritorial application of United States procedural and antitrust laws. (1980) Antitrust & Trade Reg. Rep. A-10 (May 8, 1980).

to foreign enterprises can cause conflict with the foreign governments' fundamental economic policies, just as the domestic impact of a cartel conflicts with basic U.S. economic policy as embodied in the Sherman Act. The conflict between these U.S. and foreign policies may be appropriate, and indeed desirable in some antitrust as well as non-antitrust contexts. Such conflict will in virtually all cases result, however, in certain, usually unquantifiable, costs to U.S. relationships with those nations affected. At a minimum, such discord can affect U.S. objectives in other international economic policy contexts.

Antitrust-related conflicts of this sort typically arise in three overlapping settings: one, the application of U.S. competition law generally to competition from state-controlled or state-subsidized enterprises; two, its application to seemingly private cartel arrangements conducted in connection with the natural resources or other economic development policies or industries fundamental to our trading partners; and three, the intrusion of U.S. jurisdiction into foreign territory by the demand for the production of confidential data located abroad. We discuss each in turn, noting where the conflict not only raises competition policy issues but also implicates broader issues of international trade policy as well.

1. Foreign-controlled enterprises

The bills would require the commission, as part of its comprehensive study, to assess the ability of United States enter-

prises to compete or deal effectively with foreign-controlled enterprises in market and non-market economies. Implicit in this requirement is an assumption that U.S. antitrust laws may inhibit such ability.

Neither the bills nor the statement of its sponsors reveal the source of the assumption. We believe, however, that the assumption has its origins in the following perceptions:

(1) enterprises in market economies in which foreign governments have a controlling interest often have capital, markets and supplies made available to them on terms or under circumstances that would not exist in the United States;

(2) enterprises in non-market economies likewise have access to capital and customers on terms or under conditions that would not prevail in a truly free market; moreover, the labor, energy and raw material costs of such enterprises, being established by the state, need not, and often do not, reflect the costs of comparable inputs incurred by U.S. competitors.

In both contexts, the government ownership or control of the enterprise can, and often does, serve as a medium for the major subsidization of that enterprise. Of course it must be recognized that to some degree, government policies in every nation, whether involving transportation, interest rates or energy costs, have the effect, whether or not intentional, of subsidizing domestic enterprises.

Where subsidized production is exported to the U.S., U.S. producers selling in the U.S. market can suffer injury. The U.S. countervailing duty and antidumping laws, which implement multilateral accords under GATT and which seek to define fair methods of competition in international trade, enable injured

U.S. firms to seek duties offsetting the future margin of subsidy or dumping.[14] These laws provide no relief in most circumstances involving foreign government subsidation not directed specifically to export trade, and, in any event, provide virtually no retroactive relief.

There is, in addition, a private treble damage remedy available to U.S. firms to recover for injury from intentionally dumped imports, but, because the statutory requirements are so difficult to satisfy, no firm has ever recovered damages under the statute.[15] The commission should consider whether expansion of antitrust damage remedies is appropriate in view of domestic competition policy considerations and the prospect of foreign governments' enacting similar remedies that would disadvantage U.S. exporters.[16]

14/ Title I, Trade Agreement Act of 1979, amending Title VII of the Tariff Act of 1930, 19 U.S.C. § 1671 et seq. Dumping can involve not only a price discrimination between national markets, but also selling at below fully allocated cost of production, ex government subsidy.

15/ The 1916 Antidumping Act, known formally as Section 801 of the Revenue Act of 1916 (15 U.S.C. § 72).

16/ Two major forms of government subsidy are not even explicitly covered by U.S. or multilateral trade laws. One form is government-provided preferential export financing; that subject is now being considered under the aegis of the OECD. A second form of subsidy to foreign business often occurs in the context of government conditions of approval of U.S. foreign investment, e.g. local content requirements, export requirements. These conditions also significantly affect U.S. export and investment opportunities. Because these subsidies, too, affect U.S. export competitiveness, the commission should at least be aware of their implications.

Further, with respect to displacement of U.S. export opportunities stemming from subsidized competition, the U.S. exporter arguably has a remedy, invoked only at the President's discretion, under Title IX of the Trade Agreements Act of 1979, amending the Section 301 procedures of the Trade Act of 1974. These procedures may be invoked to retaliate against "any act, policy or practice of a foreign country or instrumentality" that in effect violates a trade agreement with the U.S. or otherwise "is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce" (19 U.S.C. 2411(a)). Typically, the President only invokes the Section 301 remedy, i.e., curtailment of an important import of the offending country, to reach foreign governmental activity that violates GATT rules, whether or not the offending nation is a GATT member. As noted, the statute, however, contains no such limitation, and thus could, in theory, reach government-sanctioned import cartels, for example.

2. Natural resources, basic industries or other economic development policy

Apart from the subsidy question, the presence of foreign ownership of, or investment in, business enterprises, as well as the active role foreign governments often have in setting the production and pricing policies of private firms, should also be subjects of commission concern. In considering how such foreign government activity affects U.S. business, the commission should consider how such involvement advances or deters U.S. objectives

with respect to both international economic policy and national security policy.

For example, many countries, both developed as well as developing, have established natural resource development policies that seek a predictable flow of income to the state and to investors in natural resources development. Without such predictable cash flow, these governments are usually severely limited in their ability to increase gross national product. The same considerations can obtain with respect to the production of manufactured goods as well, from textiles to microprocessors.

Thus, another appropriate question for the commission to consider is whether and to what extent foreign cartels' establishing floor prices for their natural resources burden U.S. international economic interests. To the extent cartel participants are from nations that represent substantial actual or potential export markets for U.S. products, then the commission should assess whether and under what circumstances the U.S. has a stake in tolerating economic development schemes that enhance local gross national product sufficiently to create new opportunities for U.S. trade and investment. This may be particularly the case where such nations have limited manufacturing facilities capable of earning foreign exchange or where such nations import

the overwhelming percentage of their energy supply.17/ By contrast, the U.S. may have a different set of concerns with respect to price-fixing or export embargoes of scarce strategic materials.

3. U.S. Courts Discovery Requests for Foreign Firm Information Located Outside the U.S.

As noted, foreign governments have complained about the exercise of jurisdiction by the U.S. courts over activity outside the U.S. by nationals of their respective countries. Likewise, they have seriously complained about U.S. court orders seeking discovery of confidential information of their nationals, both in cases where their nationals are named as parties and where they are not, and even where the conduct alleged in the complaint arguably violates neither OECD nor UNCTAD guidelines on restrictive business practices or the law of the objecting foreign country. In each context, foreign governments seek to avoid their nationals having to provide information to a U.S. court that could potentially expose their nationals at least to private treble damage litigation for non-U.S. acts that may have been in accord with the foreign governments' law or policy. Among the major trading nations, only the U.S. has a private antitrust treble damage remedy. The foreign nations typically

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17/ In this context yet another appropriate question for the commission is the relation of the formal UNCTAD framework of international commodity agreement negotiations to the issues presented by such cartels involving major natural resources of our trading partners.

posit such objections in terms of U.S. assertions of jurisdiction being an unwarranted intrusion into their sovereignty.18/ This rationale for their sovereignty arguments may simply reflect the fact that "...in antitrust matters the policy of one state may be to defend what it is the policy of another to attack."19/

U.S. pretrial discovery requests tend to be far broader in scope than those permitted in other legal systems. Thus U.S discovery requests can, and often do, conflict profoundly with the other nations' jurisprudential concepts, as well as specific economic interests. Such nations include the United Kingdom and Canada.

Under OECD guidelines the U.S. Government is obligated to, and does, notify foreign governments of an intent to seek discovery in an antitrust investigation or litigation of foreign firms' foreign data.20/ In the antitrust context at least, the government enforcement officials have also implied that they will not use compulsory process to obtain such data over the objection

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18/ For example, see the British House of Lords opinion, In re Westinghouse Electric Corp. Uranium Contracts Litigation, [1977] 1 All E.R. 434 (H.L. 1977), reprinted in 17 Int'l. Mats. 38 (1978), where on sovereignty grounds, among others, the House of Lords refused to enforce letters rogatory issued by a U.S. federal district court judge in Richmond.

19/ Id.

20/ Address by Michael J. Egan, Associate Attorney General (November 3, 1977) at 9. "We will, from now on, notify any foreign government at any time that an Antitrust Division official wishes to conduct investigative interviews or other official business within its territory."

of a foreign government.[21] The commission should consider the implications of such enforcement restraint. Courts in private antitrust litigation are under no such restraint. However, it is usually difficult, and often impossible, to obtain foreign court orders to implement domestic discovery orders in antitrust cases.

Furthermore, some nations make it a criminal offense to produce the sort of documents that are often subject of discovery orders in antitrust litigation. This discovery issue can be exacerbated when U.S. courts insist that foreign, as well as U.S., firms seek exemption from foreign criminal law liability for production of documents located abroad.

In this separate context of foreign discovery the commission should consider, whether in all cases involving antitrust discovery requests opposed by foreign governments, the U.S. courts should defer use of compulsory process. This question again raises the broader one of how the U.S. legal system should balance the often competing considerations of international relations and the fundamental domestic competition policy embodied in the Sherman Act.

21/ Remarks by Donald L. Flexner, Deputy Assistant Attorney General, "Foreign Discovery and U.S. Antitrust Policy in The Conflict Resolving Mechanisms" (November 15, 1978). "In the future, we see voluntary cooperation as our first resort in obtaining information and evidence located abroad. The new emphasis is a frank recognition of the limited utility of compulsory process in these cases" (Id. at 6).

IV. Conclusion

The extraterritorial application of U.S. antitrust law raises serious economic policy questions that implicate not just U.S. competition policy interests but also economic and diplomatic interests of global dimension. The uncertainty as to whether and under what circumstances U.S. antitrust law is to be so applied simply aggrevates these concerns. Legislation should be enacted to establish a forum for prompt identification, debate and assessment of the impact of the extraterritorial reach of the antitrust laws and their appropriate application.

Respectfully submitted,

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March 26, 1981

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1981 DEC

OUR REF.

December 14, 1981

Honorable Strom Thurmond
Chairman, Judiciary Committee
United States Senate
Washington, D.C. 20510

Re: S.432, Proposed "Commission On The International Application Of The United States Antitrust Laws Act"

Dear Mr. Chairman:

We hereby transmit, for the consideration of the Committee, the unanimous views of the Committee on Ocean Liner Conferences of the Maritime Law Association of the United States* with respect to S.432, which would establish a Commission to study the international application of the United States antitrust laws.

In recent years, the United States antitrust laws have been applied with increasing frequency to international ocean liner shipping activities. Such application has become a matter of great concern to U.S. private shipping interests, foreign shipping interests and foreign governments.

We believe that the Commission proposed by S.432 would serve the public interest by reviewing the serious problems raised by the application of the antitrust laws to international ocean liner shipping, and we take this opportunity to briefly acquaint the Committee with these problems.

It would be hard to identify a business which is more international in nature than ocean liner shipping. Without ocean carriers, the export of many U.S. products would not be possible

*Because of the time factor, our Committee has not had an opportunity to present this submission to the Association itself for general member action.

and, of course, ocean carriers also bring in needed imports from our trading partners. The carriers that serve U.S. trades include those flying the U.S. flag and many foreign-flag vessels.

In this industry, the practices permitted and encouraged by our major trading partners emphasize cooperation, not competition, between carriers. In addition, U.S. law, specifically the Shipping Act of 1916, as amended, authorizes ocean carriers engaged in the foreign commerce of the U.S. to enter into and file agreements with the Federal Maritime Commission (FMC) which, inter alia, enables them to meet and to discuss and agree upon rates. The approval of such agreements by the FMC provides the parties thereto with an immunity from the antitrust laws.

However, under recent court decisions, the scope of this antitrust immunity has been reduced and is no longer clear, resulting in increasing application of the antitrust laws to liner shipping. The application of the U.S. antitrust laws, which emphasizes competition rather than cooperation, is completely inconsistent with the conduct of business under the international system of liner shipping. Carriers which serve both non-U.S. trades and U.S. trades must develop business practices for serving the U.S. trades which differ substantially from those employed in commerce with other nations. Moreover, because they are so unsure about how the antitrust laws apply to their activities, if at all, carriers in U.S. trades, both U.S. and foreign flag, cannot act in an efficient and cost effective manner.

The application of the antitrust laws to liner shipping is not in the interest of the United States. It has caused serious business and international relations problems of the type which the proposed Commission would be required to study pursuant to section 3(b) of S.432. In this regard, the Chairman of the FMC has recently noted that uncertainty about the scope of the application of the antitrust laws to ocean shipping has resulted in "commercial paralysis" in the shipping industry, making it difficult for carriers to respond to changing trade conditions.

It is also clear that the application of the U.S. antitrust laws has seriously offended and irritated our major international trading partners and allies. For example, last year the United Kingdom passed a law to limit the application of U.S. antitrust laws to UK companies. Enactment of the law was, in part, motivated by application of the antitrust laws to liner shipping. New Zealand has just passed a law specifically directed at the application of U.S. antitrust laws to liner shipping. Australia is considering such a law. The irritation is such that foreign governments have actually filed comments with the State Department urging an end to

the application of U.S. antitrust laws to ocean liner shipping. Also, U.S. companies engaged in international ocean shipping have objected to the application of the antitrust laws as strenuously as have foreign entities, and U.S. flag ocean carriers have expressed the view that the present system works a particular detriment to them.

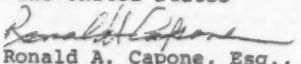
In brief, from our experience with the ocean liner shipping industry, we have no doubt that the international application of U.S. antitrust laws can cause very serious real world problems, and acts to the detriment of the United States and U.S. commerce. Thus, we support efforts, such as S.432, which we believe would help focus public attention on these problems and promote their resolution.

Lastly, recognizing the thoroughly international nature of the shipping industry, we believe that, should S.432 be enacted, the public would be well served if a representative of the shipping industry were to be named to the Commission. We believe that the insights of such a representative would prove useful to the Commission, not only with respect to the shipping industry, but with respect to the conduct of international business generally.

Thank you for your consideration of our views on this important matter.

Respectfully submitted,

Committee on Ocean Liner Conferences
of the Maritime Law Association of
the United States



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cc: Senator Mathias

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